Supreme Court, U.S.
FILED
04169 6 JUN 14 2005
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No. _____

In the Supreme Court of the United States

CHOKWE LUMUMBA,

Petitioner,

v.

THE MISSISSIPPI BAR,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of the State of Mississippi

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Mississippi Supreme Court erred in finding that the First Amendment does not prohibit a state bar association from punishing an attorney for an out of court statement to a newspaper made after conclusion of court proceedings?

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OPINIONS BELOW

On March 17, 2004, the Mississippi Supreme Court issued an en banc opinion in case number 2003-BA-02418-SCT, finding that Mr. Lumumba violated Rules 3.5, 8.2(a), and 8.4 of the Mississippi Rules of Professional Conduct, and holding that Mr. Lumumba's out of court statement to a newspaper reporter was not protected by the First Amendment to the United States Constitution, and as a result, Mr. Lumumba could be punished for them. (Miss. S.Ct. En banc Opinion, 3/17/05, Appendix 1a) (hereafter "Opinion"). Based on these findings, the Supreme Court of Mississippi ultimately increased the Complaint Tribunal's punishment for Mr. Lumumba's conduct to a six month suspension from the practice of law, a $1000.00 fine, ordered him to pay all court costs and costs accrued by the Bar Association on the appeal, and required him to retake the ethics portion of the Mississippi Bar Examination. (Opinion, pg. 29).

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Mississippi Supreme Court was entered on March 17, 2005. As that final judgment of the highest court of the State of Mississippi has been rendered on the Petitioner's claim of a violation of his rights under the U.S. Constitution, this Court has jurisdiction under 28 U.S.C. § 1257(a).

The Mississippi Supreme Court has decided an important federal question in this case in a way that conflicts with decisions of other state courts of last resort and a United States Court of Appeals. The decision of the Mississippi Supreme Court now being appealed conflicts directly with the decision of the United States Court of Appeals for the Ninth Circuit in *Standing Committee on Discipline v. Yagman*, 55

F.3d 1430, 1438 (9th Cir. 1995), with the decision of the Colorado Supreme Court in *In re Green*, 11 P.3d 1078, 1080 (Colo. 2000), with the decision of the Tennessee Supreme Court in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989), with the decision of the New York Court of Appeals in *Justices of the Appellate Division v. Erdmann*, 22 N.Y. 559, 301 N.E.2d 426 (N.Y. 1973), and with the decision of the Idaho Supreme Court in *Idaho State Bar v. Topp*, 925 P.2d 1113, 1115 (Idaho 1996). Therefore, this Court also has jurisdiction under its own Supreme Court Rule 10(b).

Furthermore, the Mississippi Supreme Court has decided an important question of federal law in this case that has not been, but should be, settled by this Court, so this Court also has jurisdiction under its own Supreme Court Rule 10(c).

STATEMENT OF THE CASE

A. Facts

On October 17, 2001, Chokwe Lumumba, a licensed attorney in the State of Mississippi, appeared before Leake County Circuit Judge Marcus D. Gordon for a hearing on post-trial motions in a criminal case. After denying Mr. Lumumba's post-trial motions, there was a verbal exchange between Mr. Lumumba and Judge Gordon concerning Mr. Lumumba's request to address another issue. After giving Mr. Lumumba permission to address his outstanding issue, Judge Gordon interrupted Mr. Lumumba, questioning his direction and an exchange ensued. Mr. Lumumba made statements during the exchange that Judge Gordon deemed disrespectful to the court. The verbal exchange culminated with Mr. Lumumba being removed from Judge Gordon's

court room, receiving a three day jail sentence and a $500 fine for contempt of court.

On or about October 19, 2001, Mr. Lumumba was released from the Leake County Jail after serving one and a half days for contempt of court. (Opinion, pg. 2, n.1). Mr. Lumumba was also required to pay a fine of $100.00. (Opinion, pg. 2).

At the end of October, Jimmie Gates, a reporter for the *Jackson Clarion-Ledger* newspaper, interviewed Mr. Lumumba by phone concerning the contempt citation. Mr. Lumumba's responses to some of the interview questions were published in a *Jackson Clarion-Ledger* article on October 31, 2001, which included the following:

> Jackson lawyer Chokwe Lumumba is appealing a contempt charge, saying the judge who had him jailed has "the judicial temperament of a barbarian."

As a result of these events, the Mississippi Bar filed a formal complaint against Mr. Lumumba with the Supreme Court of Mississippi.

B. Procedural History

The Mississippi Bar's complaint against Mr. Lumumba was heard by a Complaint Tribunal on April 22, 2003.

The Complaint Tribunal found that Mr. Lumumba had violated Rules 3.5(c), 8.4(a) and 8.4(d) of the Mississippi Rules of Professional Conduct. (Opinion and Judgment of Complaint Tribunal, 10/22/03, Appendix 52a) (hereafter "Complaint Tribunal Opinion"). The Tribunal determined

that a public reprimand was an appropriate punishment. (Complaint Tribunal Opinion, pg. 5).

One member of the three person Complaint Tribunal filed a separate written opinion dissenting in part to the Tribunal's conclusion of law that Mr. Lumumba's statement to the Jackson *Clarion-Ledger* was not protected speech under the First Amendment to the United States Constitution. (Complaint Tribunal Opinion, pgs. 7-10). The dissenting Tribunal member stated:

> This tribunal is presented with a case of first impression in Mississippi. The First Amendment guarantee of freedom of speech has collided head-on with the Mississippi Rules of Professional Conduct. The Mississippi Bar essentially asserts in its complaint that an attorney is muzzled by our rules of professional conduct and seeks to censure an attorney because of political speech critical of a member of the state judiciary.

(Complaint Tribunal Opinion, pg. 9). That dissenting Tribunal member went on to state:

> The case law from other jurisdictions addressing this issue does not support the Mississippi State Bar's contention that the comments made by Attorney Lumumba to a newspaper staff writer constitute a violation of Rule 8.4(d).

(Complaint Tribunal Opinion, pg. 9). In support, the dissenting Tribunal member cited *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995), *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989), and *Justices of the Appellate Division v.*

Erdman, 22 N.Y.2d 559, 301 N.E.2d 426 (N.Y. 1973). (Complaint Tribunal Opinion, pgs. 9-10).

The Mississippi Bar disagreed with the majority ruling of the Complaint Tribunal, and appealed the decision to the Mississippi Supreme Court, claiming the Complaint Tribunal erred by failing to find that Mr. Lumumba violated rule 8.2(a), and further claiming that a public reprimand was not the appropriate punishment for Mr. Lumumba's conduct. The Mississippi Bar wanted Mr. Lumumba suspended from the practice of law for an unspecified period of time. Mr. Lumumba cross-appealed, specifically objecting to the application of Rule 8.4 to the out-of-court statement made to the reporter as violative of the First Amendment.

On March 17, 2005, the Mississippi Supreme Court issued an en banc opinion, affirming the Complaint Tribunal's finding that Mr. Lumumba violated Rules 3.5 and 8.4 of the Mississippi Rules of Professional Conduct. (Opinion). The Supreme Court of Mississippi also specifically found that Mr. Lumumba violated Rule 8.4 in making the out of court statement to the reporter from the *Jackson Clarion-Ledger*. (Opinion pgs. 16-19, 21). Based on the finding that Mr. Lumumba's out of court statement to the reporter was not constitutionally protected speech, the Supreme Court of Mississippi increased Mr. Lumumba's punishment to a six month suspension from the practice of law, a $1000.00 fine, ordered him to pay all court costs and costs accrued by the Bar Association on the appeal, and required him to retake and pass the ethics portion of the Mississippi Bar Examination. (Opinion pg. 29).

The Mississippi Supreme Court stayed Mr. Lumumba's punishment pending an appeal to this court. Mr. Lumumba now petitions this Honorable Court for a writ of certiorari on

the single question of whether the Mississippi Supreme Court erred in finding that his out of court statement to the *Jackson Clarion-Ledger* newspaper were not protected by the First Amendment to the United States Constitution, and that he could receive additional sanctions for making that statement.

LAW AND ARGUMENT

A. CONFLICTS WITH OTHER COURTS

The March 17, 2005 en banc decision of the Mississippi Supreme Court in this case conflicts directly with the decision of the United States Court of Appeals for the Ninth Circuit in *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995), with the decision of the Colorado Supreme Court in *In re Green*, 11 P.3d 1078, 1080 (Colo. 2000), with the decision of the Tennessee Supreme Court in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989), with the decision of the New York Court of Appeals in *Justices of the Appellate Division v. Erdmann*, 22 N.Y. 559, 301 N.E.2d 426 (N.Y. 1973), and with the decision of the Idaho Supreme Court in *Idaho State Bar v. Topp*, 925 P.2d 1113, 1115 (Idaho 1996).

In a similar case cited by a dissenting member of the Complaint Tribunal and one of the dissenting justices of the Mississippi Supreme Court in the current matter, the Ninth Circuit Court of Appeals held:

> Statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they imply a false assertion of fact. Even statements that at first blush appear to be factual are protected by the First

> Amendment if they cannot reasonably be interpreted as stating actual facts about their target. Thus, statements of rhetorical hyperbole aren't sanctionable, nor are statements that use language in a loose, figurative sense.

Standing Committee on Discipline v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995) (footnotes, citations and internal quotes omitted).

The facts of *Yagman* are similar to Mr. Lumumba's case. Yagman was an attorney that expressed his opinion that a certain judge was ant-Semitic. *Id.* Yagman was quoted in the *L.A. Daily* newspaper saying that the judge "has a penchant for sanctioning Jewish lawyers . . . I find this to be evidence of anti-Semitism." *Id.* at 1434. The *Yagman* court stated that in order to be sanctionable, a lawyer's statement to the press relating to a judicial matter unrelated to a pending case must "pose a clear and present danger to the administration of justice." *Id.* at 1443. The Ninth Circuit ultimately held that an attorney could not be disciplined for criticizing a judge in this way, which was essentially an expression of Yagman's opinion. The commonalities between Mr. Lumumba's case and Yagman's include the timing of the statements after court proceedings concluded and the accusation of a negative character trait.

In addition to conflicting with the decision of the United States Court of Appeals for the Ninth Circuit in *Yagman,* discussed supra, the decision now being appealed also directly conflicts with the decisions of several state courts of last resort. In *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989), the Supreme Court of Tennessee affirmed disciplinary action against an attorney based on contempt adjudications but determined that his

numerous comments to the media critical of the judiciary were not sanctionable. *Id.* at 121. The *Ramsey* court stated in relevant part:

> The right of free speech and free discussion as it relates to the institution of law, the judicial system and its operations, is of prime importance under our system and ideals of government. A lawyer has every right to criticize court proceedings and the judges and courts of this State after a case is concluded . . .

Ramsey, 771 S.W.2d at 121.

The Mississippi Supreme Court decision also directly conflicts with the decision of the New York Court of Appeals in *Justices of the Appellate Division v. Erdmann*, 22 N.Y. 559, 301 N.E.2d 426 (N.Y. 1973). In *Erdmann*, New York's highest court summarily reversed disciplinary sanctions against a criminal defense attorney in a per curiam opinion. *Id.* Erdmann had made numerous strongly critical comments concerning judges before whom he practiced in New York City, which were ultimately published in Life Magazine. *Id.* The *Erdmann* court noted:

> Without more, isolated instances of disrespect for the law, Judges and courts expressed by vulgar and insulting words or other incivility, uttered, written, or committed outside the precincts of a court are not subject to professional discipline . . .

Erdmann, 301 N.E.2d at 427.

Similarly, the decision of the Colorado Supreme Court in *In re Green*, 11 P.3d 1078, 1080 (Colo. 2000), conflicts with the Mississippi Supreme Court's decision. In *Green*, the

Colorado high court reversed an attorney's suspension from the practice of law for disparaging the character of a member of the judiciary in letters to a trial judge and motions to recuse based on what he perceived to be racism. *Id.* The *Green* Court held that it was constitutionally impermissible to discipline an attorney for communications with a judge that did not make or imply false statements of fact. *Id.*

Finally, the decision now being appealed directly conflicts with the decision of the Idaho Supreme Court in *Idaho State Bar v. Topp*, 925 P.2d 1113 (Idaho 1996). In *Topp*, the attorney made comments to the media that a judge's decision was politically motivated. *Id.* Topp contended that his comments to the media were merely statements of opinion which must be afforded constitutional protection. *Id.* The Idaho Supreme Court affirmed the sanctions against Topp, but only after finding that the statements he made to the media were not constitutionally protected opinion because they did not provide enough information enabling the hearer to make an independent judgement, sounding more like a statement of fact than opinion. *Id.* The court held:

> Statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they imply a false assertion of fact.

Topp, 925 P.2d at 1115. (quotations and citations omitted).

B. THE MISSISSIPPI SUPREME COURT ERRED IN FINDING THAT THE FIRST AMENDMENT DOES NOT PROHIBIT A STATE BAR ASSOCIATION FROM PUNISHING AN ATTORNEY FOR AN OUT OF COURT STATEMENT TO A NEWSPAPER MADE AFTER CONCLUSION OF COURT PROCEEDINGS IN DIRECT CONFLICT WITH SEVERAL OTHER STATE SUPREME COURTS AND THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Mr. Lumumba's statement to the newspaper that Judge Gordon has the "judicial temperament of a barbarian" was merely an opinion and rhetorical hyperbole that is protected by the First Amendment. *See Yagman*, 55 F.3d at 1438. It was unrelated to any pending case and it cannot legitimately be argued that it posed a clear and present danger to the administration of justice or the proper functioning of the courts. Therefore, the statement to the *Clarion-Ledger* was not sanctionable and the Mississippi Supreme Court violated Mr. Lumumba's rights guaranteed by the First Amendment to the United States Constitution when it sanctioned him for making that statement.

Mr. Lumumba's opinion about Judge Gordon's judicial temperament is simply not an assertion of fact capable of being proved or disproved. This Court has already held that statements must be reasonably interpreted as stating actual facts about their target before they can be punishable. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988). Statements which are merely "rhetorical hyperbole," or that use language in a "loose, figurative sense" should not be sanctionable. *See National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-85, 94 S.Ct. 2770, 2781-82, 41 L.Ed.2d 745 (1974) (use

of word "traitor" could not be construed as representation of fact); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6 (1970) (use of word "blackmail" could not have been interpreted as charging plaintiff with commission of a criminal offense). Mr. Lumumba's statement to the newspaper reporter was merely an opinion about an elected judge, impossible to prove or disprove. Therefore, Mr. Lumumba's statement to the reporter was not sanctionable.

The error of the Mississippi Supreme Court in holding Mr. Lumumba's statement to the newspaper after conclusion of the court proceedings was not protected by the First Amendment, and that he could be sanctioned for it, was brought to the Mississippi Supreme Court's attention by two dissenting justices. These justices agree with Mr. Lumumba on this ground and wrote separate dissenting opinions.

> [T]he substance of Lumumba's statements rises only to the level of political hyperbole and lacks sufficient qualitative value to constitute a violation under Rule 8.4(d). Lumumba's assertion that the trial judge possessed the "judicial temperament of a barbarian" is just an opinion. There is absolutely no qualitative means available to determine whether an individual possesses the "temperament of a barbarian". Instead, Lumumba's comments to the press constitute nothing more than political hyperbole.

(Opinion, pgs. 32-33, Graves, J., dissenting).

> I cannot agree that a lawyer's out-of-court general criticism of a judge is sanctionable, unless the statement refers to a pending case and is prejudicial to

> the administration of justice. Such general criticism, I believe, is protected by the First Amendment.

(Opinion, pg. 40, Dickinson, J., concurring in part and dissenting in part).

The case Mr. Lumumba was defending when he was cited for contempt had concluded in the trial court at that time he made the statement to the newspaper. (Opinion, pgs. 2-3) (Opinion, pg. 32, Graves, J., dissenting) (Opinion, pg. 40, Dickinson, J., concurring in part and dissenting in part). Judge Gordon was a politically elected official at the time of Mr. Lumumba's comments to the newspaper. *See* Miss. Code § 9-9-1(2). Mr. Lumumba's comment to the newspaper after the conclusion of the case was a constitutionally protected political opinion. (Opinion, pg. 40, Dickinson, J., concurring in part and dissenting in part).

C. THIS COURT SHOULD RESOLVE THE CONFLICT IN THE LAW AMONG THE JURISDICTIONS AND HOLD THAT PUNISHING FOR OPINION STATEMENTS NOT SUBJECT TO FACTUAL PROOF VIOLATES THE FIRST AMENDMENT

This Court should resolve this conflict and uphold the opinions of the Supreme Courts of Idaho and Colorado, as well as the United States Court of Appeals for the Ninth Circuit by holding that statements of opinion, which are critical of a judge or of the judicial system, made after the conclusion of proceedings, and which do not affect a judicial proceeding are protected by the First Amendment unless the statement makes an assertion of fact that is capable of being proved or disproved.

The Mississippi Supreme Court's opinion also confuses the law on attorney statements in court proceedings as discussed by this Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). Statements by an attorney about a judge, even if truthful, may be punished if they are made *in court* and *relate to pending legal matters where a party might suffer prejudice as a result of the attorney's statements*. *Id.* Mr. Lumumba's case is outside the rule of *Gentile*. There are three principle difference between the *Gentile* case and Mr. Lumumba's: (1) the court proceedings had been over for some time when Mr. Lumumba made his statement to the reporter; (2) the statement was made out of court; and (3) the statement does not relate to pending legal matters. The other cases that conflict with the Mississippi Supreme Court discussed supra, are consistent with the *Gentile* decision.

Neither the legal profession nor the public benefits from sanctioning an attorney for expressing an opinion about a member of the judiciary when that opinion does not interfere with or affect any case or proceeding. As the Supreme Court of Colorado stated in *Green*, "we begin with the accepted legal principle that if an attorney's activity or speech is protected by the First Amendment, disciplinary rules governing the legal profession cannot punish the attorney's conduct." 11 P.3d at 1083; *see also In re Primus*, 436 U.S. 412, 432-33, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) (a lawyer discipline case where the court held that broad prophylactic rules in the area of free expression are suspect and precision of regulation must be the touchstone in an area so closely touching our most precious freedoms); *Bates v. State Bar of Arizona*, 433 U.S. 350, 355, 365, 384, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (holding one of Arizona's attorney discipline rules violative of the First Amendment in part because it might prevent the free flow of information and keep

the public in ignorance); *State v. Porter*, 766 P.2d 958, 966-70 (Okla. 1998) (finding an attorney's post-trial criticism of the court and the administration of the criminal justice act was protected speech under the first amendment). As an integral part of our tripartite form of government, the judiciary may be criticized by the citizens it governs; and citizens who are also lawyers should not lose this privilege.

Judge Gordon is an elected Circuit Court Judge, and as such, his conduct and demeanor on the bench is a matter of public concern. How would the people entrusted to elect him or vote him out of office make an educated decision in that regard if the attorneys who have been before him were not free to express their opinion? "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964).

CONCLUSION

For these reasons, Mr. Lumumba prays that this Honorable Court issue a writ of certiorari in this case.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MISSISSIPPI

NO. 2003-BA-02418-SCT

[Filed March 17, 2005]

THE MISSISSIPPI BAR)
)
v.)
)
CHOKWE LUMUMBA)
)

DATE OF JUDGMENT: 10/22/2003
TRIAL JUDGE: HON. ROBERT H. WALKER
DISPOSITION: SUSPENSION FROM THE PRACTICE OF LAW FOR SIX MONTHS UNTIL HE RETAKES & PASSES THE ETHICS PORTION OF THE MISSISSIPPI BAR EXAMINATION; FINED $1,000 AND PAY COSTS OF THIS CAUSE.

JUDGES: SMITH, CHIEF JUSTICE. WALLER AND COBB, P.JJ., EASLEY, CARLSON AND RANDOLPH, JJ., CONCUR. GRAVES, J., DISSENTS WITH SEPARATE WRITTEN OPINION. DICKINSON, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION. DIAZ, J., NOT PARTICIPATING.

OPINION

EN BANC.

SMITH, CHIEF JUSTICE, FOR THE COURT:

¶1. This is an appeal by the Mississippi Bar of a Complaint Tribunal decision to impose a public reprimand upon Chokwe Lumumba, an attorney licensed to practice law in Mississippi.

FACTS AND PROCEDURAL HISTORY

¶2. On October 17, 2001, Lumumba appeared before Leake County Circuit Judge Marcus D. Gordon for a hearing on post-trial motions in a criminal case. During the course of the hearing, Lumumba made the following statement to Judge Gordon: "Look, Judge, if we've got to pay for justice around here, I will pay for justice. I've paid other judges to try to get justice, pay you, too, if that's what is necessary." Other statements were also made to Judge Gordon. Judge Gordon cited Lumumba for contempt, fined him $500, and ordered him to serve three days in the Leake County Jail.[1]

¶3. Lumumba appealed the contempt citation to the Mississippi Court of Appeals, which affirmed the trial court on August 26, 2003. ***See Lumumba v. State***, 868 So. 2d 1018 (Miss. Ct. App. 2003). In its decision, the Court of Appeals stated:

> Lumumba's behavior was done in the presence of the court and intended to embarrass or prevent orderly

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[1] Lumumba actually served 1 1/2 days in the Leake County Jail.

> administration of justice. Further, it was both disrespectful to the judge and disruptive to court proceedings. We cannot fathom any situation that would warrant such behavior. This Court finds that the statements made toward the judge about how he can better get along with lawyers in the future, about the judge's "henchmen," about being proud to be thrown out of the courtroom, and about paying the judge for justice were made to embarrass the court or impede the administration of justice. This Court finds that the statements go far beyond zealous representation of one's client, and makes a mockery of the court and its proceedings.

Id. at 1021. Lumumba spent 1 and 1/2 days in jail.

¶4. In October 2001, Jimmie Gates, a reporter for the Jackson *Clarion-Ledger* newspaper, interviewed Lumumba by phone concerning the contempt citation. During the interview, Lumumba told Gates that Judge Gordon "had the judicial temperament of a barbarian." Thereafter, on October 31, 2001, the *Clarion-Ledger* published an article which included the following:

> Jackson lawyer Chokwe Lumumba is appealing a contempt charge, saying the judge who had him jailed has "the judicial temperament of a barbarian." Unapologetic for the comments that landed him in hot water, Lumumba said Tuesday, "The judge was wrong."

As a result of these events, the Mississippi Bar filed a formal complaint against Lumumba with this Court, which was heard by a Complaint Tribunal on April 22, 2003.

¶5. The Tribunal found Lumumba had violated Rules 3.5(c), 8.4(a), and 8.4(d) of the Mississippi Rules of Professional Conduct. The Tribunal determined a public reprimand was an appropriate punishment. The Mississippi Bar disagreed and appealed to this Court, claiming the Tribunal erred by failing to find that Lumumba violated Miss. R. Prof'l Conduct 8.2(a), and further claiming that a public reprimand was not the appropriate punishment for Lumumba's conduct. Instead, the Mississippi Bar wanted Lumumba suspended from the practice of law for an unspecified period of time. The Mississippi Bar stated that the length of suspension would be left up to this Court to determine. Lumumba cross-appealed, claiming his conduct did not violate the Mississippi Rules of Professional Conduct, and further claiming that he should not receive a public reprimand.

¶6. We allowed the Center for Constitutional Rights to file an amicus curiae brief, urging that Lumumba's conduct did not violate the Mississippi Rules of Professional Conduct, and that Lumumba's conduct is entitled to First Amendment protection.

ANALYSIS

¶7. This Court has exclusive jurisdiction over all matters pertaining to attorney discipline, and is "the ultimate judge of matters arising under the Rules of Discipline for the Mississippi Bar." ***Miss. Bar v. Thompson*** 797 So. 2d 197, 198 (Miss. 2000), quoting ***Broome v. Miss. Bar***, 603 So. 2d 349, 354 (Miss. 1992). Upon appeal this Court reviews the entire record and the conclusions of the Tribunal de novo. Rule 9.4 of the Rules of Discipline for the Mississippi Bar; ***Broome***, 603 So. 2d at 353 (citing ***Steighner v. Miss. State Bar,*** 548 So. 2d 1294, 1297 (Miss. 1989)). The Court may impose sanctions of either more or less severity than those

imposed by the Complaint Tribunal, although deference may be given to the Tribunal's findings because of its opportunity to observe the demeanor and attitude of the witnesses. ***Id.*** (citing ***Miss. State Bar v. Strickland***, 492 So. 2d 567 (Miss. 1986)). In order to be subject to discipline, an attorney must be shown by clear and convincing evidence to have violated a rule of professional conduct. ***Miss. Bar v. Pels***, 708 So. 2d 1372 (Miss. 1998).

¶8. For clarity and order, the arguments presented are consolidated into the following three issues:

I. Did Lumumba violate Rules 3.5 and 8.4 of the Mississippi Rules of Professional Conduct?

II. Did Lumumba violate Rule 8.2 of the Mississippi Rules of Professional Conduct?

III. If Lumumba is found to have violated the Rules of Professional Conduct, what is the appropriate punishment?

I. Rules 3.5 and 8.4 of the Mississippi Rules of Professional Conduct.

¶9. We begin with an examination of the record to determine whether, by clear and convincing evidence, Lumumba violated Rules 3.5 and 8.4 as determined by the Tribunal.

Rule 3.5

¶10. Rule 3.5(c) states that "[a] lawyer shall not: . . . engage in conduct intended to disrupt a tribunal." The Tribunal unanimously found that Lumumba's statement to Judge Gordon about paying for justice violated this rule. The

Tribunal also found that Lumumba's other comments to Judge Gordon did not violate Rule 3.5, but were "a close call."

¶11. The Bar says Lumumba's comments to Judge Gordon were abusive and went beyond advocacy, and that his conduct was belligerent and theatrical. The Bar directs us to the comment to Rule 3.5 which states:

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Miss. R. Prof'l Conduct 3.5 cmt.

¶12. Lumumba asserts that the Bar did not prove a violation Rule 3.5(c) by clear and convincing evidence. He says he was merely trying to make a record for his client, and that Judge Gordon abruptly stopped him and ordered him from the courtroom. Lumumba further asserts that his contempt citation is no proof that he disrupted courtroom proceedings for purposes of bar discipline.

¶13. The amicus argues that Lumumba did not violate Rule 3.5(c), focusing on the intent requirement of the rule. Lumumba's intent, they claim, was not to disrupt the proceedings at all, but rather to engage the court and to make a record for his client. To substantiate this position, the

amicus directs us to the following testimony provided by Lumumba to the Tribunal:

> What I was saying to the Court is that no, just fining me is not going to stop me from raising the issues for my client.
>
> And that's the way that I think that we're obligated to practice as lawyers. . . . Here's a man that's getting ready to face life in prison . . . probably beyond his life expectancy.
>
> So . . . on one hand, he's . . . telling me I've got to pay a fine. On the other hand, he's telling my client that he's got to spend life in prison. To me, it's more important for my client's interest to be represented, even if I've got to pay the fine. And so part of representing my client's interest is to make sure that the appropriate record was to be made.
>
> We were in a situation where not only was the judge denying our motion, but this was a judge . . . who was doing his best to close us down to get out of there, without . . . making a record. Even though at one point he relented, at the end, he was still doing the same thing.
>
> At this point . . . we would have to appeal it, and we would have no further chance to make a record, unless it came back on postconviction [sic], which is something the Supreme Court has to allow you to do.
>
> Essentially what I was saying is that using the contempt power was not going to be sufficient to stop me from making a record . . . for my client.

> [A] lot of times [gross miscarriages of justice] happen because records aren't made. . . . A lot of times that happened because people want to do the comfortable thing with the judge rather than sometimes challenge the judge when the judge is wrong.
>
> Sometimes the judge doesn't understand what you're saying, sometimes he confuses what you're saying, sometimes he may be mad about something else and ignoring what you're saying. . . . And so what you do is make sure that you are heard.
>
> Once you are heard, then . . . more times than not, judges will turn around and step back and say, well, you know, if you've got a reasonable position.

¶14. Thus, it is clear that Lumumba's entire defense to the claim that he violated Rule 3.5(c), is his belief that, in order to "make a record," he had to do what he had to do. We find no indication that Lumumba seriously disputes he disrupted the proceedings.[2] Rather, he says that the disruption was not his intent. The amicus cite us to ***Matter of Ray***, 2002 WI 116, 651 N.W.2d 727, 256 Wis. 2d 19 (Wis. 2002), in which the Court stated:

> Although [the accused attorney] interrupted the other attorneys . . . by stating, Oh, brother," and "Oh, what

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[2] The issue of "disrupting the proceedings" is not addressed by Lumumba, with the exception of the following statement from the "Summary of Argument" of Lumumba's brief; "The courtroom was virtually empty, the legal proceedings were completed and Judge Gordon entertained the dialogue by remaining on the bench." The amicus presents no argument or authority on the issue.

> crap," and continued to argue with [the judge] after he told her that her conduct was inappropriate, the referee found no violation. **Although he found that she had disrupted the tribunal**, he could not find evidence that she had intended such a result. Rather he perceived that she was frustrated by the entire situation and, although completely in the wrong, did not violate [Rule 3.5(c)].

Id. at 731, 733.

¶15. Lumumba's claim that he felt he needed to "make a record" is repeated throughout the briefs presented by Lumumba and the amicus. Lumumba characterizes the statements he made to Judge Gordon as "an exchange between the Court and Mr. Lumumba on the heels of Mr. Lumumba's attempt to make a record of the unfairness of the trial . . . ." Citing the comment to Rule 3.5(c), the amicus says it this way:

> Although ordinarily "an advocate can . . . protect the record for subsequent review . . . by patient firmness" . . , that was not possible for Mr. Lumumba as the judge had ordered his removal from the courtroom . . . before he could even try to protect the record.

The amicus further says that "[a]ny temporary disobedience was justified under the Rule."

¶16. The premise of these arguments is that Lumumba was prepared to present some matter to Judge Gordon which might be waived or lost unless immediately presented. We decline to accept this argument. Lumumba does not reveal to us any new issue or argument Judge Gordon did not allow him to present. Indeed, if Lumumba intended to raise some

evidentiary or procedural issue, Judge Gordon would have been obligated to reject the argument unless the matter was raised at trial. Furthermore, if Lumumba's true purpose was to "protect the record" by presenting some new issue which could not have been raised at trial, he could easily, and certainly more thoughtfully, have presented the matter in his written motion. His verbal argument at the hearing on his post-trial motions was solely for the purpose of attempted persuasion of Judge Gordon, not "making a record."

¶17. The record in this case does not support the position taken by Lumumba. The hearing which took place on October 17, 2001, began with Lumumba's argument on his motion for Judge Gordon to recuse. When the trial court denied the motion, Lumumba announced that he was ready to proceed with "evidence" concerning the "allegations we have made in the motion." The trial court then allowed Lumumba to proffer expected testimony and evidence regarding problems Lumumba perceived with some of the jurors. Lumumba's proffer spanned several pages of transcript, uninterrupted.

¶18. When Lumumba finished, the court requested case authority, but Lumumba had none. The court then allowed the State to respond, after which Lumumba was allowed an uninterrupted rebuttal. Thereafter, a short discussion took place and the court then allowed Lumumba to present still another rebuttal.

¶19. At the conclusion of the presentation by counsel, the trial court denied the motion, consuming five pages of transcript explaining his reasoning. Things went downhill from there. It was then that the following took place:

> MR. LUMUMBA: I have another application here, Judge. The Court has denied my right to call the

jurors in order to talk about the outside influences. What I would do at this time is make an application for a continuance of this motion for a new trial and for instructions to the prosecutor to provide me with the location and addresses of two people who have to do with some of the outside influences, and, there's no rule prohibiting them from testifying as to whether people know them, and, it's really no rule prohibiting a juror from testifying whether they know people, even after the verdict.

But, in any event, one would be Eric Freeman, and, the other one would be who is, interestingly enough, no longer in jail as we found out, and secondly would be Mr. Britt. So, we would be requesting that we get this information and that the hearing be continued for a sufficient amount of time for us to bring these witnesses forward to see if, in fact, as we have alleged, they have information which is helpful to the determination of this motion or any other motion which might be properly brought under the context of this motion for a new trial.

THE COURT: I am going to overrule your motion. There must be some finality to these cases. What that is, it appears to me to be entirely a fishing matter, so the final order of this Court is your motion for a new trial is overruled.

MR. LUMUMBA: Well, Judge this –

THE COURT: No additional hearing will be heard regarding your motion for new trial.

MR. LUMUMBA: Just for the record, Your Honor, it's a little more -- it's a little less than a fishing expedition . . . In fact it is very focused and direct. But, the Court's resolution of the motion is not to be unexpected, given the Court's demeanor during the entire trial.

THE COURT: What do you mean by that?

MR. LUMUMBA: What I mean is that the Court didn't handle the trial fairly, is not handling the motion fairly.

THE COURT: Well, you make it very difficult to work with, Mr. Lumumba. I think I gave you a fair trial, and, certainly, anything that I did before the jury, nothing that I did -

MR. LUMUMBA: Well, let me say this Judge.

THE COURT: Just a minute, now. I'm --

MR. LUMUMBA: I have --

THE COURT: You just --

MR. LUMUMBA: -- another --

THE COURT: -- wait just a minute.

MR. LUMUMBA: I have another --

THE COURT: I'm the Judge of this Court --

MR. LUMUMBA: I have another issue. I just want you to know I have another issue.

THE COURT: I want you to know this hearing is now over with and --

MR. LUMUMBA: Can I ask –

THE COURT: And there will be nothing else to be made of record.

MR. LUMUMBA: Can I address another issue? You don't want to hear it? You don't want the Court to hear it? It's another issue. It's not what we talked about.

THE COURT: All right. Go ahead.

MR. LUMUMBA: And, what I'm doing is offering this to you, so you can, perhaps, get along better with other lawyers in the future.

THE COURT: Well, don't you worry about --

MR. LUMUMBA: Okay. Can I finish?

THE COURT: -- how I get along with lawyers.

MR. LUMUMBA: Can I finish, please?

THE COURT: You worry about how you get along with Courts.

MR. LUMUMBA: Can I finish, please?

THE COURT: No.

MR. LUMUMBA: Judge --

THE COURT: Remove him from the Courtroom.

MR. LUMUMBA: Are you going to have --

THE COURT: I am going to have you removed --

MR. LUMUMBA: -- your henchmen throw me out, Judge?

THE COURT: Until you show some respect to the Court --

MR. LUMUMBA: I'm trying to show you some respect.

THE COURT: Will you remove him from the Courtroom?

MR. LUMUMBA: **That's the way you've handled it the whole Court. I'm proud to be thrown out of your Courtroom.**

THE COURT: All right. Just a minute. That will cost you three hundred dollars, Mr. Lumumba. Now if you want to continue -

MR. LUMUMBA: **Look, Judge, if we've got to pay for justice around here, I will pay for--**

THE COURT: -- I will exercise my discretion --

MR. LUMUMBA: -- justice.

THE COURT: -- regarding a jail sentence.

MR. LUMUMBA: **I've paid other judges to try to get justice, pay you, too, if that's what is necessary.**

THE COURT: It will cost you $500.00. You will serve three days in the County Jail. You will start serving it immediately, for contempt of Court.

MR. LUMUMBA: No problem. Are you going to feed me? I can't get my bag?

THE COURT: Court is in recess.

(Emphasis added).

¶20. A careful review of this transcript clearly reveals that the "issue" Lumumba wanted to raise did not relate to his client at all, but rather was Lumumba's advice on how Judge Gordon could "get along better with other lawyers in the future." The balance of the transcript speaks for itself. The result of Lumumba's conduct was a fine and contempt of court order to serve time in jail. Then, in his testimony before the Tribunal, Lumumba stated that "just fining me is not going to stop me from raising the issues for my client." We also find that Lumumba's statements to the trial judge regarding paying off judges were intended to disrupt, and in fact did disrupt, the court proceedings.

¶21. Since it is glaringly obvious that Lumumba's conduct violated Rule 3.5(c), it is equally as obvious to conclude that his conduct also violated Section (a) of Rule 3.5. Rule 3.5(a) states that "[a] lawyer shall not seek to influence a judge,

juror, prospective juror or other official by means prohibited by law." When Judge Gordon asked to have Lumumba removed from the courtroom, Lumumba stated "that's the way you've handled it the whole Court. *I'm proud to be thrown out of your Courtroom.*" (emphasis added). Then, when Judge Gordon advised Lumumba that he would immediately begin serving three days in the county jail for contempt of court, Lumumba tauntingly said, "no problem. Are you going to feed me? I can't get my bag?" While these comments are abusive and disruptive, they are also evidence the fact that Lumumba was purposefully attempting to exert influence over Judge Gordon through intimidation. Lumumba's menacing, belligerent attitude was an unmistakable attempt to "bully" Judge Gordon into making decisions that were in accordance with Lumumba's ultimate intentions. Further, when Lumumba remarked that he was "proud to be thrown out of your courtroom," this was an unambiguous, open admission of Lumumba's lack of respect for Judge Gordon as well as the judiciary as a whole.

Rule 8.4

¶22. The Tribunal was correct in finding that Lumumba's conduct also violated Rule 8.4. The Mississippi Rules of Professional Conduct 8.4 states: "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct . . . (d) engage in conduct that is prejudicial to the administration of justice . . .." When this Court reviews a disciplinary action from the Complaint Tribunal, the evidence is examined de novo. Rule 9.4 of the Rules of Discipline for the Mississippi Bar; ***Broome v. Miss. Bar***, 603 So. 2d 349, 353 (Miss. 1992) (citing ***Steighner v. Miss. State Bar***, 548 So. 2d 1294, 1297 (Miss. 1989)). Therefore, we must examine the entire record de novo and consider all of Lumumba's conduct and statements to

determine if Lumumba violated Rule 8.4. It is very apparent that all of Lumumba's statements, those made in the courtroom and those to the *Clarion-Ledger*, are prejudicial to the administration of justice and indicates conduct which is connected to judicial proceedings.

¶23. The United States Supreme Court has held that conduct prejudicial to the administration of justice is synonymous with "'conduct unbecoming a member of the bar' [or] conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts." ***In re Snyder***, 472 U.S. 634, 645, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985). *See also* ***Rogers v. Miss. Bar***, 731 So. 2d 1158, 1170 (Miss. 1999) Similarly, the Fifth Circuit, in holding that Rule 8.4(d) was neither overly broad or vague, found that the Rule's application was consistent with the "state's primary concern ... the obligation of lawyers in their quasi-official capacity as assistants to the court." ***Howell v. State Bar of Texas***, 843 F.2d 205, 207 (5th Cir. 1988). The Rule was applied in the context of preventing conduct which is detrimental to "the trial of cases in the court and their judicial determination and disposition by orderly procedure, under rules of law and putting of the judgment into effect." ***Id.*** Mississippi's application of the rule is consistent with that adopted in ***Howell***. ***Id***. Likewise, the comment to Rule 8.4 states that "a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice." Furthermore, our case law further indicates that conduct which is prejudicial to the administration of justice is that conduct which is *connected* to judicial proceedings. ***Rogers***, 731 So. 2d at 1170. (emphasis added). There can be no doubt that Lumumba made this comment to a reporter knowing that it was in direct response to the reporter's question about the Payton case and specifically about Judge Gordon. Also,

Lumumba appealed his contempt of court, fine and jail time which was affirmed by the Court of Appeals. He appealed this bar case to our Court. Additionally, he appealed his client Payton's case where this conduct occurred. This Court reversed and remanded Payton's case to the trial court and Judge Gordon, the very judge to whom Lumumba had made so many derogatory comments. We find that this was conduct directly related to or connected to a judicial proceeding or having a prejudicial effect thereon. *See* ***Rogers***, at 1170 and ***Byrd v. Miss. Bar***, 826 So. 2d 1249, 1253 (Miss. 2002).

¶24. Lumumba's statement and behavior in the courtroom directly affected the judicial proceeding. With regard to Rule 3.5(c), Lumumba's statement about "paying for justice," the fact that Lumumba tried to give Judge Gordon advice on "how to get along better with other lawyers in the future," and his statement about how the judge was going to have his "henchmen" throw him out clearly disrupted judicial proceedings. Henchmen are defined as "a political follower giving active support; an unscrupulous often violent member of a gang." Webster's Third New International Dictionary 1056 (1986). Thus, the use of the word henchmen by Lumumba was disrespectful, extremely inappropriate, and nothing less than an attempt to intimidate Judge Gordon. Furthermore, Lumumba's statements were clearly made in the course of the proceedings and directly affected the judicial proceedings. While the hearing was being concluded, the case was proceeding for "judicial determination and disposition" and ultimate determination on appeal by this Court. ***Howell***, 843 F.2d 205 at 207. Besides, it was Lumumba's claim of having another "issue" to argue that convinced Judge Gordon to allow Lumumba to continue. Thus, for argument purposes, even if the hearing had been concluded, which it was not, Judge Gordon clearly reopened the proceedings supposedly so that Lumumba could raise another legal issue. However, as

the record reveals, this claim was instead a subterfuge, as Lumumba never argued a new legal issue but rather launched into another insulting comment towards Judge Gordon. The entire episode was transcribed on the record by the official court reporter. Since this Court reviews the whole record de novo, this statement about "paying for justice"and all his other conduct and statements made in the courtroom clearly violated Rule 8.4(d) in that it was prejudicial to the administration of justice and indicated a lack of those characteristics relevant to law practice.

¶25. Lumumba also violated Rule 8.4(d) when he made the "barbarian" comment to the *Clarion-Ledger*. This "barbarian" comment was simply one of many inappropriate statements that Lumumba made during the course of these proceedings. Even though this statement was made after the trial, it was a matter *connected* to a judicial proceeding which was ongoing and continuing towards determination and disposition, ultimately concluding on appeal to this Court. ***Rogers***, 731 So. 2d at 1170. Also, as stated previously, the comments to Rule 8.4(d) state that offenses that indicate a lack of those characteristics relevant to law practice is prejudicial to the administration of justice. The "barbarian" comment definitely indicates a lack of those characteristics relevant to the practice of law and was directly related and connected to the judicial proceeding. This comment is definitely conduct unbecoming a member of the bar and conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts which the Supreme Court holds as synonymous to conduct that is prejudicial to the administration of justice. Therefore, the "barbarian" comment made to the *Clarion-Ledger* clearly violated Rule 8.4(d).

¶26. Lumumba's conduct and statements in the courtroom are not protected by the First Amendment and he may be sanctioned under Rule 8.4. The majority of state and federal courts have found First Amendment protection arguments unpersuasive because the state's interest is in protecting and defending its public officials and in maintaining a respect for the judiciary. *See* Charles W. Wolfram, Modern Legal Ethics, § 11.3.2, at 602-03 (1986). An attorney may not "seek refuge within his own First Amendment right of free speech to fill a courtroom with a litany of speculative accusations and insults." ***United States v. Cooper***, 872 F.2d 1, 3 (1st Cir. 1989). The basic legal reasoning in support of this position is "lawyers are officers of the Court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech." ***Gentile v. State Bar of Nevada***, 501 U.S. 1030, 1081-82, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991)(O'Connor, J., concurring). We agree. It is a privilege to practice law, and the principle here is that we give up many rights ordinary citizens have in order to be practicing lawyers. As officers of the Court we are required to behave in accordance to certain high standards. Lumumba has the same obligation as do all lawyers. If he had problems with Judge Gordon, there are mechanisms in place which he is required to follow to address his concerns, rather than do so in the manner he did here.

¶27. Likewise, Lumumba's statement that Judge Gordon has the "judicial temperament of a barbarian" is not protected by the First Amendment, and he can be sanctioned for making it under Rule 8.4. In the case of ***In re Holtzman***, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (N.Y. 1990), an attorney released to the media specific allegations of improper judicial conduct and the court rejected the First Amendment challenge. In the case sub judice, by Lumumba stating

directly to the media that Judge Gordon has "the judicial temperament of a barbarian," he directly attacks Judge Gordon's qualifications, his impartiality, the Circuit Court of Leake County and the entire judicial system. The statement made was clearly "commented" to the ***Payton*** case. ***Rogers***, 731 So. 2d at 1170. The term barbarian is defined as "believed to be inferior to one's own", "lacking refinement, learning, artistic or literary culture", "a savage", "marked by a tendency toward brutality, violence, or *lawlessness* but sometime displaying a rough vigor or vitality; a race which possesses neither virtue nor humanity." Webster's Third New International Dictionary 174 (1986) (emphasis added). Thus, here, the attack is against the entire judicial system and society as a whole. Lumumba knowingly discussed this issue and made his comments to the media with full knowledge that they were looking for a headline. While Lumumba was apparently unconcerned with his statement to the media, one of his law partners obviously was so concerned that he attempted to clarify the statement to the reporter on Lumumba's behalf. In the case of ***In Re Holtzman***, the court held that "professional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations." 577 N.E.2d at 34. The court also held that

> the issue raised when an attorney makes public a false accusation of wrongdoing by a Judge is not whether the target of the false attack has been harmed in reputation; the issue is whether that criticism adversely affects the administration of justice and

adversely reflects on the attorney's judgment and, consequentially, her ability to practice law.

Id.

¶28. As stated above, Lumumba's statement to the *Clarion-Ledger* clearly affected the administration of justice and also adversely reflected on his judgment and ability to practice law. The Court, in determining whether the First Amendment provided protection for this attorney, used an objective standard. *Id.* "In order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard of what a reasonable attorney would do in similar circumstances." *Id.* Lumumba's course of conduct clearly satisfies this standard and therefore is not protected by the First Amendment. Since Lumumba is not protected by the First Amendment, this Court can and will sanction him for making the "barbarian" statement to the *Clarion-Ledger* under Rule 8.4.

II. Did Lumumba violate Rule 8.2(a)?

¶29. Rule 8.2(a) prohibits a lawyer from making a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. As mentioned previously, our review of this issue is de novo, and accordingly, we make findings of fact as well as conclusions of law. It is readily apparent that all of Lumumba's statements were, in fact, made with wilful, reckless disregard as to their truth concerning Judge Gordon's qualifications and integrity as a judge.

¶30. Since the applicable standard of review is de novo, this Court is not restricted to the specific issues presented on

appeal, but instead, may review any and all charges against Lumumba regarding the entirety of Lumumba's comments in this disciplinary proceeding. Lumumba's statement to Judge Gordon that "I've paid other judges to try to get justice, pay you too if it's necessary," was a direct attack on the character and integrity of Judge Gordon. It is clearly a direct insinuation that Judge Gordon, among other things, is dishonest, requiring payment by Lumumba in order for justice to be had in the circuit court. "Integrity," is defined as "an uncompromising adherence to a code of moral, artistic, or other values; avoidance of deception; the quality or state of being undivided." Webster's Third New International Dictionary 1174 (1986). Lumumba's comment suggests that justice has been for sale before in other courts and that he had bought and paid for it. He inferred that if it was for sale by Judge Gordon he would buy justice again. By expressly stating that payment for justice was a feasible option, Lumumba unequivocally and recklessly undermined Judge Gordon's judicial integrity or his moral code, ability to be unimpaired, or impartial. The repeated similar allegations of buying justice in several different courts suggests that Lumumba keeps a $100 bill specifically for the purpose of theatrically demonstrating "paying for justice" when the opportunity presents itself.

¶31. Lumumba made numerous additional comments during the course of proceedings that constitute a continuing, wilful, reckless disregard as to their truth or falsity concerning the qualifications or integrity of a Judge Gordon. For example, when Judge Gordon denied his motion for a new trial, he said "what I mean is that the Court *didn't handle the trial fairly*, is not handling the motion fairly." (emphasis added.). It is undisputed that fairness is an imputed qualification for a judge, and by specifically stating otherwise in open court, Lumumba contemptuously attacked Judge Gordon's

qualifications. Lumumba then claimed to desire to raise another legal issue but instead attempted to offer Judge Gordon advice on "how to get along better with other lawyers in the future," and when Judge Gordon asked to have him removed from the courtroom, Lumumba asked if the judge was going to have his "henchmen" throw him out.

¶32. Lumumba's aforementioned "barbarian" comment also falls under the purview and meaning of Rule 8.2. As mentioned previously, a "barbarian" is defined as "lacking refinement, gentleness, learning; tendency towards brutality, violence or lawlessness." Webster's Third New International Dictionary p.174, 1986. Quite obviously, averring that Judge Gordon's temperament was like that of a barbarian, Lumumba wilfully and knowingly undermined the presumed integrity and qualifications of Judge Gordon. It would be impossible to have a steadfast adherence to a moral code, be unimpaired, and undivided, while also being a fierce, brutal, or cruel person. Even though being called a barbarian may not at first glance infer dishonesty, it undeniably evinces distrust as to Judge Gordon's integrity as well as his qualifications as a judge. To suggest otherwise, is an intolerable miscarriage of justice as well as condonation that incites continued patterns of egregious disrespect by some lawyers for the judiciary. Lumumba's statements and conduct clearly violated Rule 8.2.

¶33. Lumumba's conduct and statements in the courtroom are not protected by the First Amendment and he may be sanctioned under Rule 8.2. In ***Florida Bar v. Ray***, 797 So. 2d 556 (Fla. 2001), the court addressed conduct that violated

Rule 4-8.2(a)[3] of the Rules of Professional Conduct and whether or not the First Amendment provided any protection. The court followed a long line of precedent cases, including the ***Holtzman*** case, which held that attorney misconduct is not protected under the First Amendment because the conduct was not founded on the objectively reasonable attorney standard. ***Id.***(citing ***In re Holtzman***, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (N.Y. 1990)). In ***Ray***, an attorney released letters to the media that were false allegations of misconduct that questioned the integrity of an immigration judge. ***Id.*** The Florida court held that "ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice." ***Id.*** at 558-59. The court further stated that

> [b]ecause members of the Bar are viewed by the public as having unique insights into the judicial system, the state's compelling interest in preserving public confidence in the judiciary supports applying a different standard than that applicable in defamation cases. For this reason, we, like many other courts, conclude that in attorney disciplinary proceedings under rule 4-8.2(a), the standard to be applied is whether the attorney had an objectively reasonable factual basis for making the statements.

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[3] Rule 4-8.2(a) of the Florida Rules of Professional Conduct is exactly the same as Rule 8.2(a) of the Mississippi Rules of Professional Conduct.

Id. Lumumba's actions and statements are clearly not those of a reasonable, objective attorney, and as such, are not protected by the First Amendment so accordingly, they are sanctionable.

III. What is the appropriate sanction for Lumumba's conduct?

¶34. The Complaint Tribunal ordered a public reprimand. The Mississippi Bar has appealed that decision, seeking a more severe punishment. In measuring the appropriateness of punishment of an attorney for violation of the rules of professional conduct, we look at (1) the nature of the conduct involved; (2) the need to deter similar misconduct; (3) the preservation of the dignity and reputation of the profession; (4) the protection of the public; and (5) the sanctions imposed in similar cases. See ***Miss. Bar v. Alexander***, 669 So. 2d 40, 42 (Miss. 1996) (citing ***Miss. Bar v. Attorney R.***, 649 So. 2d 820, 824-25 (Miss. 1995).

Nature of the conduct involved.

¶35. A review of the transcript leaves no reasonable doubt that Lumumba chose truculent language for the purpose of inciting anger. Such tactics are perhaps arguably understandable at times in the cross examination of a witness, but are never appropriate when addressing a court. Lumumba's duty was to his client, not to his own need to test the trial judge in a verbal battle over whether or not the trial court had been fair, and whether the trial court needed instruction in how best to get along with other lawyers among other inappropriate comments. Under the guise of "protecting the record," Lumumba abandoned his client to pursue his own interests. To compound his inappropriate motive, he chose language clearly outside the bounds of reasonable, respectful

advocacy, regardless of his purpose. Furthermore, his "barbarian" comment to the *Clarion-Ledger* attacked the integrity of the Judge and the judiciary as a whole.

The need to deter similar misconduct.

¶36. This Court cannot abide conduct calculated to disrupt a tribunal and which implies that justice can be bought and sold. Were we to overlook Lumumba's conduct, we have no doubt other members of the Bar would be encouraged to exhibit less respect for the courts. If history teaches us anything in this respect, it is that our judicial system cannot function properly where there exists a pervasive lack of respect for the courts and judges. An attorney need not personally like or respect a judge or justice, but when communicating with the court, the attorney is required to show respect for the position and institution.

The preservation of the dignity and reputation of the profession.

¶37. No more need be said than has already been said above regarding the need to deter similar conduct.

The protection of the public.

¶38. Our failure to properly condemn Lumumba's conduct would result in the understandable perception that his conduct is acceptable. That, of course, would lead inescapably to others engaging in similar conduct, thereby compromising the cases of their clients. The public is entitled to know that when lawyers engage in such conduct, their clients are not well served.

The sanctions imposed in similar cases.

¶39. Other than a previous case involving similar conduct by Lumumba, for which he was disciplined and one other reported case for which he was not sanctioned we know of no other case decided by this Court where an attorney has addressed a trial court in the manner as disrespectful and insulting as here. However, the Bar cites numerous cases in other jurisdictions in which attorneys have been disbarred, suspended and reprimanded for similar conduct. For example, in ***United States District Court for Eastern District of Washington v. Sandlin***, 12 F.3d 861 (9th Cir. 1993), an attorney was suspended from the practice of law for six months for making false statements about a trial judge in reckless disregard for their truth. Moreover, in ***Comm. on Legal Ethics v. Farber***, 185 W. Va. 522, 408 S.E.2d 274 (W. Va. 1991), a lawyer was given a three-month suspension for three separate counts of misconduct and indefinite suspension (pending proof of emotional and psychological stability) because he had a "pattern and practice" of lashing at judges with reckless accusations. The attorney misrepresented facts in a motion to disqualify a circuit judge and made allegations against that judge to a special prosecutor and again falsely accused the circuit judge of criminal acts. ***Id.*** Also, in ***Bar Ass'n of Greater Cleveland v. Carlin***, 67 Ohio St. 2d 311, 423 N.E.2d 477 (Ohio 1981), an attorney was suspended from the practice of law for one (1) year for persistently responding to court rulings with statements of disbelief, profanity, obscenity, disparagement of the judge and other manifestations of disrespect and discourtesy.

¶40. In the case of ***In re Evans***, 801 F.2d 703 (4th Cir. 1986), a lawyer was disbarred from the practice of law for reasserting charges against a judge, without investigating. The Fourth Circuit stated that the "failure to investigate, coupled

with his unrelenting reassertion of the charges . . . convincingly demonstrates his lack of integrity and fitness to practice law." ***Id.*** at 706. Also, in ***In re Palmisano***, 70 F.3d 483 (7th Cir. 1995), which was a reciprocal discipline case where Palmisano was disbarred in Illinois for making blameless accusations of crime, and lesser wrongs against judges, the Seventh Circuit stated that federal courts "are no more willing to tolerate repeated, false, malicious accusations of judicial dishonesty than are state courts." ***Id.*** at 488. Likewise, in ***People ex. rel. Chicago Bar Ass'n v. Metzen***, 291 Ill. 55, 125 N.E. 734 (Ill. 1919), the court disbarred an attorney who brought suit against a trial judge for damages on account of his ruling and prepared newspaper articles gaining publicity for his suit. When a lawyer repeatedly made grossly disrespectful allegations against a judge, he was subsequently disbarred from the practice of law. ***In re Whiteside***, 386 F.2d 805 (2d Cir. 1967). Finally, in ***State ex rel. Nebraska State Bar Ass'n v. Michaelis***, 210 Neb. 545, 316 N.W.2d 46 (Neb. 1982), *cert. denied and appeal dismissed*, 459 U.S. 804, 103 S. Ct. 27, 74 L. Ed. 2d 42 (1982), an attorney was disbarred when, while at a hearing on charges of making unfounded allegations against judges, continued his attacks, and also attacked the deciding court just prior to its decision. These cases are exemplary of a federal and state judiciary that refuses to condone or even entertain conduct by attorneys that is unprofessional or unethical.

¶41. We have also recognized as an important factor prior disciplinary sanctions against an attorney. See ***Terrell v. Miss. Bar***, 662 So. 2d 586, 592-93 (Miss. 1995); ***The Miss. Bar v. Hall***, 612 So. 2d 1075, 1077 (Miss. 1992); ***Haimes v. Miss. Bar***, 601 So. 2d 851, 853 (Miss. 1992); ***Culpepper v. Miss. Bar***, 588 So. 2d 413, 421 (Miss. 1991). In that regard, we are informed by the Bar that

(1) Mr. Lumumba had previously been found in contempt of Court twice in Michigan and once in New York because of actions he took while acting as trial counsel for separate, unrelated clients, though Mr. Lumumba testified the Michigan contempt citations were subsequently reversed on appeal; He had previously been issued an Informal Admonition by the Mississippi Bar's Committee on Professional Responsibility in Docket No. 97-73-1; and Mr. Lumumba was also issued a Public Reprimand by the Bar's Committee on Professional Responsibility on April 13, 2000 in Docket No. 99-208-1 when he was found to have violated the provisions of Rules 3.5(c) and 8.4(a, d and e), MRPC, for behavior similar to the conduct involved in the instant proceeding.

¶42. The Bar reasons that a public reprimand is insufficient, pointing out that Lumumba received a public reprimand for engaging in very similar conduct in the previously cited case, and has now repeated the offense, demonstrating the insufficiency of that sanction. We agree.

¶43. Lumumba's conduct, in the case sub judice, as well as his extensive history of similar misconduct, most assuredly constitutes serial misconduct. Lumumba has continued to demonstrate to the courts of this state, as well as the courts of Michigan and New York, that he does *not* respect the courts, judges, or justices. All of his conduct and actions, whether viewed as a whole or in part, unabashedly violate Rules 3.5, 8.2, and 8.4 of the Mississippi Rules of Professional Conduct. Here, the dissenting member of the Tribunal was absolutely correct in stating that Lumumba showed "indifference to his legal obligation to conduct himself in a professional manner." The dissenting member also noted, quite accurately, that a public reprimand would neither adequately demonstrate that

this type of behavior will not be tolerated, nor serve a sufficient deterrent for Lumumba. Also, as shown by his serial, willful misconduct, a public reprimand will not serve as a deterrent for Lumumba.

¶44. Lumumba's flagrant refusal and self-imposed immunity to the authority of the judiciary, fellow members of the Bar, and the legal community as a whole is intolerable. One need only look at Lumumba's almost identical behavior in ***Glover v. Jackson State University***, 755 So. 2d 395 (Miss. 2000), to observe that Lumumba's conduct is a continuing pattern of conduct regardless of the presiding trial judge. Lumumba's comments there caused the learned circuit judge to declare a mistrial in order for justice to prevail. In ***Glover***, we note that he similarly treated a Hinds County Circuit Court judge who was African American in like fashion as he did Judge Gordon, referring to the trial judge as "unfair and biased", and stating further, "you know Judge, you have a selective memory, but, since you don't seem to be listening anyway, I'm going to stop talking." Lumumba made other quotes to the extent that the judge finally remarked on the record that in "most courts in this country most judges would have found him [Lumumba] in contempt." He [Lumumba] said I was "dumb." The trial judge also remarked that, "in the five years that I've presided in trials and heard motions and everything else, **no other lawyer has ever talked to me the way you have talked to me today**, Mr. Lumumba." (emphasis added). Showing remarkable restraint, the trial judge nonetheless, did not hold Lumumba in contempt. Instead, the judge believed Lumumba's conduct to be so inappropriate that he was forced to declare a mistrial and recuse himself from the case. ***Id.*** at 402-03. This behavior caused extreme hardship upon the parties, especially the defendants who did not want a mistrial. Thus, we clearly see that the issue in the case at bar is a continuing wilful pattern

of unprofessional conduct by Lumumba against any judge or court, regardless of race or gender, wherein Lumumba finds himself at odds with that judge's rulings.

CONCLUSION

¶45. After thorough review of this record and considering all necessary analysis of the criteria set out in ***Miss. Bar v. Inserra***, 855 So. 2d 447, 450 (Miss. 2003), and other factors set out herein, we conclude that it is apparent that Lumumba needs a more severe punishment than a public reprimand. To do less would be inequitable and in our view not prohibit or persuade Lumumba from engaging in similar conduct towards our trial judge in the future. For the violations of Rules 3.5, 8.2, and 8.4, Lumumba is suspended from the practice of law for six months and until he retakes and passes the Ethics portion of the Mississippi Bar Examination, fined in the amount of $1000, and required to pay all costs accrued by the Bar and costs taxed in this appeal.

¶46. CHOKWE LUMUMBA IS SUSPENDED FROM THE PRACTICE OF LAW FOR SIX MONTHS AND UNTIL HE RE-TAKES AND PASSES THE ETHICS PORTION OF THE MISSISSIPPI BAR EXAMINATION, FINED $1,000 WHICH IS DUE AND PAYABLE TO THE CLERK OF THIS COURT WITHIN 30 DAYS, AND PAY COSTS OF THIS APPEAL.

WALLER AND COBB, P.JJ., EASLEY, CARLSON AND RANDOLPH, JJ., CONCUR. GRAVES, J., DISSENTS WITH SEPARATE WRITTEN OPINION. DICKINSON, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION. DIAZ, J., NOT PARTICIPATING.

GRAVES, JUSTICE, DISSENTING:

¶47. My dissent from the majority is three-fold. First, I disagree with the majority's decision that Chokwe Lumumba's conduct during the post-trial hearing violated Rule 8.2(a) of the Mississippi Rules of Professional Conduct. Rule 8.2(a) seeks to sanction statements of fact, not mere opinions which do little to attack the qualifications or integrity of a judge. Second, I disagree with the majority's decision that Lumumba's statements to the *Clarion - Ledger* violated Rule 8.4(d). While Lumumba's statements to the press do not necessarily warrant First Amendment protection, those statements, standing alone, are not violative of Rule 8.4(d). Lastly, I disagree with the severity of the sanction imposed by the majority. The majority offers little substance to suggest that Lumumba's violations of the rules warrant a suspension of six months from the practice of law and a fine of $1,000 plus costs. Under the facts before us, this is an extreme and draconian sanction which is not proportional to the particular offenses. Because of this, I am forced to respectfully dissent.

Violation of Rule 8.2(a)

¶48. The majority holds that Lumumba's statements made during the course of the post-trial hearing violated Rule 8.2 of the Mississippi Rules of Professional Conduct. As the majority correctly points out, Rule 8.2(a) prohibits a lawyer from making a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. In support of its finding that Lumumba violated Rule 8.2(a), the majority turns to Lumumba's statement, "I've paid other judges to try to get justice, pay you too if it's necessary." The majority contends that this comment attacked the character of the trial judge as well as undermined his integrity. The majority also finds that

other statements Lumumba made on the record come within the auspices of Rule 8.2(a), including:

> Lumumba: "What I mean is that the Court didn't handle the trial fairly, is not handling the motion fairly."
>
> Lumumba: "And what I'm doing is offering this to you, so you can, perhaps, get along better with other lawyers in the future."

¶49. While the above statements are irresponsible and unbefitting a member of the Bar, I cannot agree that these statements are sanctionable under Rule 8.2(a). Rule 8.2(a) deals with those **statements of fact,** not just mere opinions, which attack the qualifications or integrity of a judge. Considering the substance of the rule, the majority's holding is very problematic.

¶50. It cannot be established that any of Lumumba's statements made during the hearing qualify as statements of fact which would be sanctionable under Rule 8.2(a). Instead, Lumumba's statement that the "Court didn't handle the trial fairly," is his raw and unedited opinion concerning the events of the trial. Lumumba's statement about "getting along better with other lawyers in the future," is also completely devoid of any factual predicate. Generally, a statement of fact is of a matter whose truth can be objectively determined. There is no objective manner to assess the truthfulness of any statement Lumumba made during the post-trial hearing.

¶51. Rule 8.2(a) contains an actual malice standard which seemingly tracks the standard for defamation of a public figure. Where the defamed party is a public figure, such a party is prohibited from recovering damages unless that party

proves that the statement was made with actual malice - that is, with knowledge that it was false or with reckless disregard of whether it was false or not. ***Curtis Publishing Co. v. Butts***, 388 U.S. 130, 164, 87 S. Ct. 1975, 1996, 18 L. Ed. 2d 1094 (1967); ***New York Times Co. v. Sullivan***, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); ***Blake v. Gannett Co.***, 529 So. 2d 595, 600-01 (Miss. 1988). However, in the instant action, Lumumba's words on their face were neither defamatory, nor violative of Rule 8.2(a) considering that no statement of fact (alleged or otherwise) was ever published concerning the trial judge's qualifications or integrity. Thus, I am compelled to dissent from the majority's holding that Lumumba's statements violated Rule 8.2(a).

Violation of Rule 8.4(d)

¶52. The majority holds that Lumumba's statement to the *Clarion-Ledger* violated Rule 8.4(d). Lumumba was quoted as saying, "[Judge Gordon] has the judicial temperament of a barbarian." Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

¶53. First, at the time Lumumba made the statement to the press, the case which brought Lumumba before the trial judge (in a representative capacity) was over. Lumumba's statements to the press were not prejudicial to the administration of justice in that no judicial proceeding was ongoing. The post-trial hearing was conducted on October 17, 2001, and the *Clarion-Ledger* article was published on October 31, 2001. Given the span of approximately two weeks, it is difficult to conclude that Lumumba's statements to the press in some way adversely affected the legal rights or interests of his client or the State. Inasmuch as the post-trial

hearing had concluded prior to Lumumba's statements to the press, I cannot agree with the majority that his statements to the press were prejudicial to the administration of justice.

¶54. Second, the substance of Lumumba's statements rises only to the level of political hyperbole and lacks sufficient qualitative value to constitute a violation under Rule 8.4(d). Lumumba's assertion that the trial judge possessed the "judicial temperament of a barbarian" is just an opinion. There is absolutely no qualitative means available to determine whether an individual possesses the "temperament of a barbarian." Instead, Lumumba's comments to the press constitute nothing more than political hyperbole. As the majority points out, the denotation of a "barbarian" is one comparable to a savage and one who is marked by a tendency toward brutality, violence, or lawlessness. Obviously, there is no sophisticated manner to equate Lumumba's statement to the denotation of a "barbarian." Thus, without more, I cannot agree that Lumumba's words to the newspaper rise to the level of a sanctionable offense.

Severity of the Sanction Imposed

¶55. The Complaint Tribunal found that Lumumba's conduct before Judge Gordon as well as the statements made during the *Clarion-Ledger* interview violated Rules 3.5(c), 8.4(a), and 8.4(d) of the Mississippi Rules of Professional Conduct. Even after finding that three (3) separate provisions were violated, the Tribunal determined that a public reprimand was an appropriate punishment considering the circumstances. Today, the majority finds that Lumumba's violation of the rules warrants a suspension of 6 months from the practice of law and a fine of $1,000 plus costs. The majority imposes a harsher sanction than did the Tribunal while the majority finds the same number of violations as did

the Tribunal. This result seems patently unfair considering that Lumumba has already served 1 and 1/2 days in jail and paid a fine.

¶56. While it is true that this Court has exclusive jurisdiction over all matters pertaining to attorney discipline and this Court is free to impose sanctions either more or less severe than those imposed by the Complaint Tribunal, deference is afforded to the Tribunal's findings because of its opportunity to observe the demeanor and attitude of the witnesses, including the attorney, which is vital in weighing evidence. ***Parrish v. Miss. Bar,*** 691 So. 2d 904, 906 (Miss. 1996), ***Broome v. Miss. Bar,*** 603 So. 2d 349, 353 (Miss. 1992) (citing ***Miss. State Bar Ass'n v. Strickland,*** 492 So. 2d 567 (Miss. 1986)). Also, when assessing the sanction to be imposed against an attorney in a disciplinary action, this Court applies the following nine criteria:

(1) the nature of the misconduct involved;

(2) the need to deter similar misconduct;

(3) the preservation of the dignity and reputation of the profession;

(4) the protection of the public;

(5) the sanctions imposed in similar cases;

(6) the duty violated;

(7) the lawyer's mental state;

(8) the actual or potential injury resulting from the misconduct; and

(9) the existence of aggravating or mitigating factors.

Miss. Bar v. Inserra, 855 So. 2d 447, 450 (Miss. 2003). The only reasoning that the majority gives for ignoring the Tribunal's recommendation of a public reprimand is that Lumumba received a public reprimand once before for engaging in very similar conduct and now repeats the offense.[4] This reasoning is flawed in that the majority bases its holding on one or two of the above enumerated factors and fails to consider them holistically. In assessing sanctions for attorney misconduct, we are free to contemplate the performance of a lawyer in our deliberations. ***See Miss. Bar v. Coleman,*** 849 So. 2d 867, 876 (Miss. 2002) (examining conduct of attorney). We can also consider prior infractions by attorneys in imposing disciplinary measures. ***Byrd v. Miss. Bar,*** 826 So. 2d 1249, 1255 (Miss. 2002) (examining that attorney had been given one public reprimand, one private reprimand, and three informal admonitions in ten years when considering disbarment). However, when considering sanctions for attorney misconduct, this Court's focus should not be solely upon prior attorney misconduct, but rather, upon the factors in toto. Thus, the majority seemingly holds that a suspension of six months from the practice of law is warranted because of Lumumba's prior public reprimand. Essentially, there is no need to have a multi-factored approach to assessing sanctions for attorney misconduct if we are not going to consider each factor.

¶57. In considering the nature of Lumumba's misconduct,

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[4] Lumumba had previously been issued a Public Reprimand by the Bar's Committee on Professional Responsibility on April 30, 2000 in Docket No. 99-208-1, in which he was found to have violation the provision of Rules 3.5(c) and 8.4(a, d, and e) of the Mississippi Rules of Professional Conduct.

the majority states that during the exchange between Lumumba and the trial judge, Lumumba abandoned the interest of his client to pursue his own in waging a verbal battle with the trial court over whether or not the trial court had been fair. On this point, it is important to note that during the post-trial hearing, there were no other parties, attorneys, or witnesses present in the courtroom waiting to be heard by the trial court. The record reflects that the only individuals present during the hearing were the trial judge, the judge's staff, Lumumba, Lumumba's client, and opposing counsel. While it is clear that the words Lumumba used to express himself were inexcusable and at best "truculent," the effect of Lumumba's words, however lasting and/or damaging, was limited to only those individuals present in the courtroom at the time the exchange took place. Clearly, Lumumba's comments were wrong and completely inappropriate. However, because such comments did not result in actual or potential injury to the tribunal, it cannot be established that they were so grossly egregious as to warrant a six month suspension.

¶58. Today, the majority holds that Lumumba's statements to the trial judge regarding "paying off judges" were intended to disrupt, and in fact did disrupt, the court proceedings in violation of Rule 3.5(c). The majority does not address an extremely important issue regarding the rationale behind Lumumba's sanction. Prior to publishing the words for which Lumumba is being sanctioned, Judge Gordon said, "I want you to know this hearing is now over with and -" Lumumba said, "Can I ask -" Judge Gordon said, "And there will be nothing else to be made of record." At that very moment, the hearing had adjourned, and the proceedings were concluded. Rule 3.5(c) prohibits a lawyer from engaging in conduct intended to disrupt a tribunal. It is problematic to sanction Lumumba for disrupting a tribunal, when the tribunal had

already adjourned the proceeding. Before the exchange which resulted in the Rule 3.5(c) violation, the trial judge had already ruled on Lumumba's motions. In addition to the numerous and rigorous demands placed upon trial court judges, they never relinquish the tantamount responsibility of ensuring order and control in their courtrooms, even among lawyers. Because the hearing had concluded or, at least, so nearly concluded Lumumba's statements concerning "paying off judges" were at most, minimally disruptive. Thus, I conclude that a Rule 3.5(c) violation under the present circumstances warrants no more than a public reprimand.

¶59. The majority correctly points out that this case is one of first impression. Prior to this, the only violations of Rule 3.5 of the Professional Rules addressed by this Court dealt with sub-parts (a) and (b). *See Miss. Bar v. Logan*, 726 So. 2d 170, 178 (Miss. 1998) (an attorney's ex parte communication with a magistrate for purposes of obtaining procedural advice was not a violation of Rule 3.5(a) prohibiting ex parte communication with judge or other official, in light of the fact that it appeared to be a common and accepted practice at the time the attorney did so); *Attorney L.S. v. Miss. Bar*, 649 So. 2d 810, 813 (Miss. 1994) (an attorney's contact with jurors post-verdict when such conduct is prohibited by court order, and misrepresenting his authority to talk to jurors violated Rule 3.5(b) and warranted a private reprimand).

¶60. Without any guiding precedent, we look to case law from our sister jurisdictions. The facts in the instant case are most similar to those in *Prucker v. Statewide Grievance Committee*, 1995 Conn. Super. LEXIS 1729, 1995 WL 356758 (Conn. Super. Ct. 1995). In *Prucker*, an attorney appealed a decision from the statewide grievance committee which recommended that the attorney be reprimanded. *Id.*

During a workers' compensation hearing, Prucker became frustrated at what he considered to be a lack of progress on his client's claim. ***Id.*** As the hearing drew to a close, Prucker walked out of the room, saying "Bullshit" or "This is bullshit." ***Id.*** The commissioner admonished the attorney to refrain from using profanity, but Prucker did not respond and walked out. ***Id.*** The Commissioner stated in her written complaint that Prucker shouted expletives at her, and that the hearing had not concluded when Prucker walked out. ***Id.*** The reviewing committee concluded that Prucker's conduct constituted a violation of Rule 3.5(3) of the Rules of Professional Conduct and recommended that Prucker be reprimanded. ***Id.*** On appeal, the Superior Court of Connecticut affirmed the ruling of the reviewing committee. ***Id. Prucker*** is very similar to the facts in the instant action. Lumumba's comments to Judge Gordon, while not profane, bear the same degree of inappropriateness as those used by the attorney in ***Prucker.*** In ***Prucker***, the commissioner stated that the proceeding had not concluded, and therefore, the attorney's comments were held to have violated Rule 3.5(3). In the case sub judice, assuming that the hearing had not adjourned, Lumumba's resulting violation of Rule 3.5(c) cannot be said to warrant anything more than a public reprimand.

¶61. While we review disciplinary matters de novo, we are permitted to defer to the findings of the Tribunal. Today, the majority chooses to ignore the recommendation of the Tribunal. The Tribunal considered all of the evidence in this case, including its personal observation of the witnesses as well as Lumumba's testimony and determined that a public reprimand was appropriate under these facts. It is illogical for the majority to hold that Lumumba violated the same rules determined by the Complaint Tribunal but should receive a harsher sanction. In my opinion, the paramount issue for this

Court to consider while taking all the factors of ***Inserra*** into account when assessing the gravity of a sanction is whether or not the sanction is proportional to the rule(s) violated. A disciplinary sanction must reflect the serious nature of the harm inflicted on the orderly administration of justice by the attorney's behavior. In the instant action, I am of the opinion that a public reprimand is the appropriate sanction under the present circumstances.

¶62. The Preamble to the Mississippi Rules of Professional Conduct reads, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold [the] legal process." This theme is reiterated in the comment to Rule 3.5 which states, "Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." Unquestionably, Lumumba's conduct on the record fell short of these honorable standards. However, I wholly conclude that Lumumba's comments did not result in any injury to the tribunal, the administration of justice or the legal process. To this end, I respectfully dissent from the majority's holding to suspend Lumumba from the practice of law for a period of six months.

DICKINSON, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶63. In my view, the majority is correct in finding that attorney Chokwe Lumumba violated Rules 3.5 and 8.4 of the Mississippi Rules of Professional Conduct by making numerous statements in court, on the record, which not only were calculated to disrupt the tribunal, but also served to prejudice Lumumba's client. However, because I conclude

that the statement made by Lumumba to the reporter for the *Clarion-Ledger* was political speech protected by the First Amendment to the United States Constitution, and because I do not believe the record supports a finding that Lumumba's statement to the reporter related to a pending case or served to prejudice the administration of justice, I am not prepared to agree that Lumumba violated Rule 8.4(d) by making it. I therefore respectfully dissent, in part.

¶64. I wish to clearly point out that my disagreement with the majority is not with its interpretation of the law, but rather with its determination of facts. I do not believe the Bar met its burden of proving Lumumba's statement to the reporter was directed toward the pending case. The statement, on its face, is general in nature, and expresses Lumumba's personal opinion of the judge's judicial temperament. The Bar produced no evidence to prove the statement was made as a criticism of the judge's conduct in the pending case. Had I concluded, after reviewing the record, that the statement referred to Lumumba's case pending before the judge, I would have concluded - as the majority did - that it violated Rule 8.4. However, I cannot agree that a lawyer's our-of-court general criticism of a judge is sanctionable, unless the statement refers to a pending case and is prejudicial to the administration of justice. Such general criticism, I believe, is protected by the First Amendment.

Rule 8.4

¶65. Mississippi Rule of Professional Conduct 8.4 states: "It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice."

¶66. A majority of the Tribunal held that Lumumba violated MRPC 8.4(a) and 8.4(d) when he stated to a *Clarion Ledger* reporter that Judge Gordon has "the judicial temperament of a barbarian." A dissenting member of the Tribunal, however, believed that Lumumba's statements to the *Clarion-Ledger* reporter was protected by the First Amendment, and that therefore there was no violation of the Rules of Professional Conduct.

¶67. Although we have no Mississippi cases directly on point, several cases from other jurisdictions have held that similar attorney criticism of judges is protected by the First Amendment. For instance, in ***Standing Committee on*** Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995), the Ninth Circuit held that an attorney could not be disciplined for expressing his opinion that a judge was anti-Semitic. The attorney in ***Yagman*** was quoted in the *L.A. Daily* as saying that the judge "has a penchant for sanctioning Jewish lawyers . . . I find this to be evidence of anti-Semitism." ***Id.*** at 1434.

¶68. In ***Ramsey v. Board of Professional Responsibility***, 771 S.W.2d 116 (Tenn. 1989), numerous comments to the media critical of the judiciary were held to be protected and not sanctionable because "[a] lawyer has every right to criticize court proceedings and the judges and courts of this State after a case is concluded, so long as the criticisms are made in good faith with no intent or design to wilfully or maliciously represent those persons or institutions or bring them into disrepute.").

¶69. In ***Justices of the Appellate Division v. Erdmann***, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (N.Y. 1973), sanctions against lawyer who made critical comments about judges before whom he practiced were reversed as insufficient to warrant discipline. The offending comments,

which appeared in the March 12, 1971 issue of *Life* magazine, were:

> There are so few trial judges who just judge, who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams. I would like to [be a judge] just to see if I could be the kind of judge I think a judge should be. But the only way you can get it is to be in politics or buy it - and I don't even know the going price.

Id. at 441-42 (Burke, J., dissenting). These comments clearly would have been sanctionable if directed toward a particular judge, and made in court during the course of representation of a client in a case. However, the statements were not about a particular case, and were made outside the court to a *Life* magazine reporter. Consequently, they were found to be merely out-of-court statements of political opinion and protected by the First Amendment.

¶70. The Bar argues that Lumumba's statement to the reporter was, indeed, a violation of the Rules of Professional Conduct, and not protected by the First Amendment because it was prejudicial to the administration of justice. The Bar says comparing his judicial temperament to that of a barbarian impugned Judge Gordon's integrity, qualifications to hold office, and the integrity of the judicial system. The Bar fails, however, to direct us to evidence in the record to support this theory. Additionally, it could be argued that the Bar's position would prevent any criticism of any judge, since it might impugn the judge's "integrity, qualifications to hold office, and the integrity of the judicial system."

¶71. The Bar further submits that there are other available avenues for lawyers to air grievances against the judiciary without being publicly disrespectful, i.e. appealing rulings and filing complaints with the Mississippi Commission on Judicial Performance. This interesting observation has no bearing on the question before us. Either Lumumba had a right to make the statement, or he did not. If he did, the availability of other "avenues" is irrelevant.

¶72. To support its position, the Bar cites ***People ex rel. Chicago Bar Association v. Metzen***, 291 Ill. 55, 125 N.E. 734, 735 (Ill. 1919), in which the Illinois Supreme Court held that a lawyer should "submit his grievances to the proper authorities," while "unjust criticism, insulting language and offensive conduct toward the Judges, personally, by attorneys, who are officers of the Court, which tend to bring the Courts and the law into disrepute and to destroy public confidence in their integrity cannot be permitted." The Bar also submits ***United States v. Cooper (In re Zalkind)***, 872 F.2d 1, 3 (1st Cir. 1989), which held that the First Amendment did not protect an attorney who insulted a judge and raised doubts about the judge's impartiality, and ***In re Holtzman***, 78 N Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (N.Y. 1990), in which a First Amendment challenge to discipline was rejected based on the need to protect the public interest and maintain the integrity of the judicial system. I find these cases to be clearly distinguishable. ***Cooper*** involved an attorney's conduct and language to the judge *while in court*, while the attorney in ***Holtzman*** released to the media *specific allegations* (as opposed to opinions) of misconduct which were found to be false.

¶73. Lumumba and the amicus argue that Rule 8.4(d) is violated only when an attorney engages in misconduct which has a prejudicial effect on a judicial proceeding. They cite

Rogers v. Miss. Bar, 731 So. 2d 1158, 1170 (Miss. 1999), in which this Court stated: "for the most part [Rule 8.4(d)] has been applied to those situations where an attorney's conduct **has a prejudicial effect** on a judicial proceeding or a matter directly related to a judicial proceeding." ***See also Byrd v. Miss. Bar***, 826 So. 2d 1249, 1253 (Miss. 2002).

¶74. I suppose any lawyer making a statement critical of a judge could later regret it, should the judge retaliate in a subsequent judicial proceeding. And such retaliation could, I suppose, be called prejudicial. But if the effect of the rule is to bar all out-of-court criticism by lawyers of judges for fear of what it might do, then I reject it.

¶75. In ***Yagman***, the court held that in order to be sanctionable, a statement to the press relating to a judicial matter unrelated to a pending case must "pose a clear and present danger to the proper functioning of the courts." Lumumba's "judicial temperament of a barbarian" statement was simply an opinion of political speech which I would find protected by the First Amendment. In ***Yagman***, the court stated:

> Statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they imply a false assertion of fact. Even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target. Thus, statements of rhetorical hyperbole aren't sanctionable,

> nor are statements that use language in a loose, figurative sense.

55 F.3d at 1438 (footnotes, citations, & internal quotes omitted).

¶76. I have seen no evidence that Lumumba's statement affected any judicial proceeding. More importantly, I believe Lumumba's out-of-court statement to the reporter was one of opinion and thus protected by the First Amendment.

¶77. Rule 8.4(d) states that it is misconduct for an attorney "to engage in conduct that is prejudicial to the administration of justice." (emphasis added). The Rule does not say "might have been prejudicial. Rule 8.4(d) may therefore be applied only to conduct that affects a judicial proceeding or a matter directly affecting a judicial proceeding, as this Court stated in ***Rogers***, 731 So. 2d at 1170, and ***Byrd***, 826 So. 2d at 1253.

¶78. If the phrase "prejudicial to the administration of justice" were applied to statements made outside the courtroom which are not shown to have caused any problem or prejudice in any case, Rule 8.4(d) would be subject to such broad interpretation that I can not conceive of the scope of its application to judicial criticism. Members of the bar would have difficulty in determining what activities, conduct, or speech could potentially be covered by the rule. The Bar would be justified in pursuing sanctions against members for anything that could be seen as a negative reflection on a judge or the profession - even where such negative reflection were justified.

¶79. The record does not demonstrate that Lumumba's comment to the *Clarion-Ledger* affected a judicial proceeding or any matter directly related to a judicial proceeding. His

statement was doubtless insulting to Judge Gordon, as it would be to me. But the Bar has not demonstrated prejudice to any case or legal proceeding. Indeed, we are left only to assume that the comment related to the previous hearing, rather than a general response to a general question from the reporter during the interview, I therefore do not agree that Lumumba violated Rule 8.4(d).

¶80. It is my belief that this Court should hold that statements of opinion critical of a judge or of the judicial system, made outside the courtroom - and which do not affect a judicial proceeding - are generally protected by the First Amendment unless they imply a false assertion of fact capable of being disproved. ***See Milkovich v. Lorain Journal Co.*** 497 U.S. 1, 18-19, 110 S. Ct. 2695, 2705-06, 111 L. Ed. 2d 1 (1990)(citing Restatement (Second) of Torts § 566, Cmt. *a* (1977)). This was the reasoning adopted by the Supreme Court of Idaho, ***Idaho State Bar v. Topp***, 129 Idaho 414, 925 P.2d 1113, 1115 (Idaho 1996), and the Supreme Court of Colorado, ***In re Green***, 11 P.3d 1078, 1080 (Colo. 2000).

¶81. Furthermore, the United States Supreme Court has held that statements must be *reasonably* interpreted as stating actual facts about their target before they can be punishable. ***Hustler Magazine, Inc. v. Falwell***, 485 U.S. 46, 50, 108 S. Ct. 876, 879, 99 L. Ed. 2d 41 (1988). Statements which are merely "rhetorical hyperbole," or that use language in a "loose, figurative sense" should not be sanctionable. ***National Ass'n of Letter Carriers v. Austin***, 418 U.S. 264, 284-85, 94 S. Ct. 2770, 2781-82, 41 L. Ed. 2d 745 (1974)(use of word "traitor" could not be construed as representation of fact); ***Greenbelt Coop. Publishing Ass'n v. Bresler***, 398 U.S. 6, 14, 90 S. Ct. 1537, 1541, 26 L. Ed. 2d 6 (1970)(use of word "blackmail" could not have been interpreted as charging plaintiff with commission of criminal offense). Lumumba's

statement may be characterized as one of "rhetorical hyperbole."

¶82. Lumumba did not assert that Judge Gordon was literally a barbarian, but rather used the phrase to express his opinion, right or wrong, of Judge Gordon's judicial temperament. Certainly, false assertions of fact are punishable, as are opinions that imply a false assertion of fact. Additionally, statements by an attorney about a judge, even if truthful, may be punished if they are made in court and relate to pending legal matters where a party might suffer prejudice as a result of the attorney's statements. *See* ***Gentile v. State Bar of Nevada***, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991). However, neither the Bar nor the majority explains how the profession or the public benefits from sanctioning an attorney for expressing an opinion about a member of the judiciary when that opinion does not interfere with or affect any case or proceeding. As the Supreme Court of Colorado stated in ***Green***, "we begin with the accepted legal principle that if an attorney's activity or speech is protected by the First Amendment, disciplinary rules governing the legal profession cannot punish the attorney's conduct." 11 P.3d at 1083 (citing ***In re Primus***, 436 U.S. 412, 432-33, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978); ***Bates v. State Bar of Arizona***, 433 U.S. 350, 355, 365, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977); ***State v. Porter***, 1988 OK 114, 766 P.2d 958, 966-70 (Okla. 1988).

¶83. As an integral part of our tripartite form of government, the judiciary, may be criticized by the citizens it governs; and citizens who are also lawyers should not lose this privilege. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." ***Garrison v. Louisiana***, 379 U.S. 64, 74, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125 (1964).

¶84. I would hold the Tribunal erred in finding a violation of Rule 8.4(d) for Lumumba's statement to the reporter. Additionally, because I do not believe the statement violated Rule 8.4(d), I would also hold there was no violation of Rule 8.4(a) with regard to this statement. In all other respects, I am in agreement with the majority.

APPENDIX B

SUPREME COURT OF MISSISSIPPI
(BEFORE A COMPLAINT TRIBUNAL)

NO. 2002-B-1292

[Filed October 22, 2003]

THE MISSISSIPPI BAR)
)
v.)
)
CHOKWE LUMUMBA)
)

JUDGE ROBERT H. WALKER
HONORABLE FELICIA DUNN BURKES
HONORABLE JAMES R. REEVES, JR.

OPINION AND JUDGMENT

The Tribunal heard this matter Tuesday, April 22, 2003, on Formal Complaint filed by The Mississippi Bar against Chokwe Lumumba. Honorable Michael B. Martz represented The Bar. Mr. Lumumba was represented by Honorable Everett Sanders, Honorable Imhotep Alkebu-lan, Honorable Jeffrey L. Edison, and Honorable Adjoa Artis Aiyetoro. Disposition of the matter has been delayed due to time required for preparing the record of the hearing and briefing

by the parties which finally concluded in late September 2003. After considering all the evidence and applicable law, the Tribunal finds The Bar has proven certain factual allegations of its Formal Complaint and that Mr. Lumumba violated Rules of Professional Conduct applicable to members of The Mississippi Bar. Based upon the testimony of the witnesses, the evidence received and applicable law, the Complaint Tribunal renders the following findings of fact, conclusions of law and judgment.

On August 9, 2002, The Bar filed its Formal Complaint against Mr. Lumumba, based upon the latter's conduct at a hearing before Circuit Court Judge Marcus D. Gordon and upon remarks he made to a newspaper reporter two weeks later. As a member of the Mississippi Bar, Mr. Lumumba is subject to the disciplinary jurisdiction of the Mississippi Supreme Court and its designated agencies. He was personally served with a copy of the summons and an attested copy of the Formal Complaint August 16, 2002, and filed his answer October 16, 2002. This Tribunal has jurisdiction over the parties and the subject matter. The Tribunal finds The Bar has incurred the sum of $44.97 in costs and expenses prior to the filing of the Formal Complaint, as well as additional costs and expenses occasioned by the litigation of the matter.

On October 17, 2001, Mr. Lumumba was in court for a hearing on post-trial motions filed in the Circuit Court of Leake County, Mississippi in Cause No. 8474, "State of Mississippi v. Henry C. Payton." In that case, in a jury trial presided over by Judge Gordon, Payton had been convicted of armed robbery and arson and sentenced by Judge Gordon. When the Judge overruled his post-trial motion, Mr. Lumumba stated on the record that, "the Court's resolution of the motion is not to be unexpected, given the Court's demeanor during the entire trial the Court didn't handle the

trial fairly, is not handling the motion fairly." Judge Gordon attempted to end the matter there, but Mr. Lumumba insisted he had another issue to address, and proceeded to tell Judge Gordon how to get along with lawyers. The Court advised Mr. Lumumba to concern himself, instead, with how he could get along with Courts, and again attempted to end the matter. Mr. Lumumba continued to speak and Judge Gordon ordered him removed from the Courtroom until he showed "some respect to the Court..." Mr. Lumumba stated he was "proud to be thrown out of [Judge Gordon's] Courtroom...." Judge Gordon found Mr. Lumumba in contempt and fined him. Still, Mr. Lumumba continued, stating, "if we've got to pay for justice around here, I will pay.... I've paid other judges to try to get justice, pay you, too, if that's what is necessary." Judge Gordon added a three-day jail sentence as additional sanction for Mr. Lumumba's conduct. Mr. Lumumba appealed his contempt conviction.

Approximately two weeks after the motion hearing, Mr. Lumumba spoke to newspaper reporter Jimmie Gates about the contempt matter. In an article published in the Jackson, Mississippi *Clarion Ledger* October 31,2001, Gates quoted Mr. Lumumba as stating that Judge Gordon has "the temperament of a barbarian." The article also quoted the court transcript of Mr. Lumumba's in-court comments that he had "paid other judges to try to get justice, pay you, too, if that is necessary." The newspaper article, Exhibit 3 in the present proceeding, related that Mr. Lumumba had been previously publicly reprimanded for conduct before Hinds County Circuit Judge W. Swan Yerger during a courtroom exchange in which Mr. Lumumba threw a $100 bill on Judge Yerger's bench after being held in contempt of court, stating, "So you've got to pay for justice around here." Mr. Lumumba was issued a Public Reprimand for that conduct in Judge Yerger's court, as reflected in the April 13, 2000 order

of the Bar's Committee on Professional Responsibility which was introduced as Exhibit 4 in the present controversy.

On August 26, 2003, the Mississippi Court of Appeals, with nine justices concurring, affirmed Judge Gordon's Leake County Circuit Court judgment finding Mr. Lumumba in contempt. In *Chokwe Lumumba v. State of Mississippi,* No. 2001-CA-01621-COA (August 26, 2003), the Court of Appeals specifically rejected Mr. Lumumba's contentions that his conduct did not constitute contempt because the hearing was over when he made his comments, and that he was simply being a zealous advocate for his client. The Court of Appeals stated:

> Lumumba's behavior was done in the presence of the court and intended to embarrass or prevent orderly administration of justice. Further, it was both disrespectful to the judge and disruptive to court proceedings. We cannot fathom any situation that would warrant such behavior. This Court finds that the statements made toward the judge about how he can better get along with lawyers in the future, about the judge's "hen hmen,"[1] about being proud to be thrown out of the courtroom, and about paying the judge for justice were made to embarrass the court or impede the administration of justice. **This Court finds that the statements** go far beyond zealous representation of one's client, and **make a mockery of the court and its proceedings**. (emphasis added)

---

[1] When Judge Gordon ordered him removed from the courtroom, Mr. Lumumba made reference to the judge's having his "henchmen" throw him out.

Part I

Rule 3.5 of the Rules of Professional Conduct states: "A lawyer shall not ... (c) engage in conduct intended to disrupt a tribunal." The Comment to Rule 3.5 states:

> Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate.

This Tribunal unanimously finds by clear and convincing evidence that Mr. Lumumba violated Rule 3.5 by his in-court statements about paying for justice. While the Tribunal finds it a close call as to the other in-court statements which were to some degree made in the heat of the moment, the Tribunal finds those statements did not violate Rule 3.5.

Part II

Rule 8.4 states: "It is professional misconduct for a lawyer to (a) violate or attempt to violate the rules of professional conduct ...; (d) engage in conduct that is prejudicial to the administration of justice ...." By a majority vote, the Tribunal further finds that in making his comments to news reporter Jimmie Gates, Mr. Lumumba also violated Rule 8.4. The Tribunal heard the testimony of both Mr. Gates and Mr. Lumumba, and unanimously, specifically finds the latter knew he was speaking to a newspaper reporter when he made the comments.

Part III

Based upon these facts, the Tribunal must determine whether Mr. Lumumba's violations of the Rules of Professional Conduct merit imposition of discipline. Aggravating factors presented at the hearing included evidence that: (1) Mr. Lumumba had previously been found in contempt of Court twice in Michigan and once in New York because of actions he took while acting as trial counsel for separate, unrelated clients, though Mr. Lumumba testified the Michigan contempt citations were subsequently reversed on appeal; (2) Mr. Lumumba has previously been issued an Informal Admonition by the Mississippi Bar's Committee on Professional Responsibility in Docket No. 97-73-1; (3) Mr. Lumumba has previously been issued a Public Reprimand by the Bar's Committee on Professional Responsibility on April 13, 2000 in Docket No. 99-208-1, in which he was found to have violated the provisions of Rules 3.5(c) and 8.4(a, d and e) of the Mississippi Rules of Professional Conduct for behavior similar to the conduct involved here.

By a majority, the Tribunal finds that the appropriate sanction for Mr. Lumumba's conduct is that he should be issued a Public Reprimand only – that his conduct was not sufficiently egregious to warrant a more severe sanction.

JUDGMENT

Based upon the foregoing findings of fact and conclusions of law, the Judgment of the Tribunal is as follows:

Mr. Lumumba shall be, and is hereby, issued a PUBLIC REPRIMAND for his violation of Rules 3.5 and 8.4 of the Mississippi Rules of Professional Conduct as stated above,

and the Clerk shall immediately forward a copy of this Opinion and Judgment to each party.

When this Opinion and Judgment becomes final, the Clerk of the Mississippi Supreme Court shall forward an attested copy of same to Judge Marcus D. Gordon, Post Office Box 220, Decatur, MS 39327, and to the Executive Director for The Mississippi Bar at Post Office Box 2168, Jackson, Mississippi 39255-2168.

Pursuant to Rule 8.6 of the Rules of Discipline of The Mississippi Bar, when this Opinion and Judgment becomes final, a copy of same shall be forwarded to the Judges of the Circuit, Chancery and County courts in and for Hinds County, Mississippi, with instructions to the senior judges of each of these courts to include a copy of this Opinion and Judgment upon the minutes of the respective courts.

When this Opinion and Judgment becomes final, the Clerk of the Mississippi Supreme Court shall forward a copy of same to the Senior Circuit Court Judge in and for Hinds County, Mississippi together with a directive that Mr. Lumumba be ordered to appear before said Circuit Court on the first day of the term convening next after this Public Reprimand becomes final, or on some other similar day when the maximum number of the Bar are present, at which time the Public Reprimand shall be read by the Senior Circuit Court Judge or by his designee.

When this Opinion and Judgment becomes final, it shall become a matter of public record, and the contents of Docket No. 2002-B-1292 shall in all respects be a public record.

This Opinion and Judgment shall remain in full force and effect until further order of the Supreme Court of Mississippi.

Mr. Lumumba shall pay The Bar the sum of $44.95 in costs and expenses incurred prior to the filing of the Formal Complaint, as well as the costs and expenses occasioned by its litigation.

SO ORDERED, ADJUDGED AND DECREED, this the 21st day of October, 2003.

/s/_____
Judge Robert H. Walker, Presiding Judge
Concurring in Parts I and II, Dissenting
with separate written opinion as to Part III

/s/_____
Honorable Felicia Dunn Burkes,
Concurring in Parts I and III, Dissenting
with separate written opinion as to Part II

/s/_____
Honorable James R. Reeves, Jr.,
Concurring in Parts I, II and III

Honorable Felicia Dunn Burkes, dissenting in part:

Before this tribunal is a Formal Complaint filed by the Mississippi State Bar against Chokwe Lumumba, Attorney at Law on or about August 9, 2002.

During 2001, Attorney Lumumba represented Henry C. Payton in cause number 8474, a multi-count indictment returned by the grand jury of Leake County, Mississippi. Circuit Court Judge Marcus Gordon presided over the Henry C. Payton case. Mr. Payton's case was tried to a jury and he was convicted on all charges - armed robbery, kidnapping and second degree arson. Attorney Lumumba filed post-trial

motions on behalf of Mr. Payton. The motion for new trial was heard by Judge Gordon on October 17, 2001.

As a result of comments made by Attorney Lumumba to the trial judge during the October 17, 2001 motion hearing, Attorney Lumumba was held in criminal contempt of court and incarcerated. After the October 17, 2001 hearing, Attorney Lumumba was contacted by a staff writer for the Clarion-Ledger newspaper concerning his fine and incarceration for criminal contempt of court. Attorney Lumumba made comments to the staff writer that were published in the Clarion-Ledger on October 31, 2001. Sometime thereafter the Mississippi State Bar initiated disciplinary action against Attorney Lumumba.

Ultimately, a Formal Complaint was filed which alleges, in part, that "[s]ometime after the hearing on October 17, 2001 Mr. Lumumba was questioned by ... a staff writer with the Clarion-Ledger newspaper about the .... hearing on October 17, 2001. During this questioning, Mr. Lumumba said ... [Judge Gordon] has 'the judicial temperament of a barbarian.'"

I join the majority in its factual findings that Attorney Lumumba did make the comment that Judge Gordon has "the judicial temperament of a barbarian" and further, that he knew he was speaking to a newspaper reporter at the time the comment was made. Notwithstanding, our unanimity relative to the facts, I respectfully disagree with the majority's conclusion of law that the statement is a violation of Rule 8.4(d) of the Mississippi Rules of Professional Conduct.

Rule 8.4(d) states, "It is professional misconduct for a lawyer to: ... (d) engage in conduct that is prejudicial to the administration of justice."

This tribunal is presented with a case of first impression in Mississippi. The First Amendment guarantee of freedom of speech has collided head-on with the Mississippi Rules of Professional Conduct. The Mississippi State Bar essentially asserts in its complaint that an attorney is muzzled by our rules of professional conduct and seeks to censure an attorney because of political speech critical of a member of the state judiciary.

The case law from other jurisdictions addressing this issue does not support the Mississippi State Bar's contention that the comments made by Attorney Lumumba to a newspaper staff writer constitute a violation of Rule 8.4(d).

In *Standing Committee on Discipline v. Yagman,* 55 F.3d 1430 (9th Cir. 1995) the Ninth Circuit Court of Appeals held that an attorney who remarked that a judge "has a penchant for sanctioning Jewish lawyers [and] I find this evidence of anti-Semitism" could not be disciplined as the comment was an expression of opinion based on disclosed facts which is protected political speech under the First Amendment and, further, that the comment could not be said to interfere with the administration of justice. *Id.* at 1438, 1443.

In *Ramsey v. Board of Professional Responsibility,* 771 S.W.2d 116 (Tenn. 1989), the Supreme Court of Tennessee affirmed disciplinary action against an attorney based on contempt adjudications but determined that his numerous comments to the media critical of the judiciary were not sanctionable. Justice Drowota wrote for the Tennessee Supreme Court:

> In dealing with First Amendment questions, we must balance the right of the speaker to communicate and the right of the listener to receive his expressions with

> the need of the courts to enforce attorney discipline to the end that a lawyer will not engage in conduct that is prejudicial to the administration of justice ....
>
> The right of free speech and free discussion as it relates to the institution of the law, the judicial system and its operations, is of prime importance under our system and ideals of government. A lawyer has every right to criticize court proceedings and the judges and courts of this State after a case is concluded, so long as the criticisms are made in good faith with no intent or design to wilfully or maliciously misrepresent those persons or institutions or the bring them into disrepute. As state by this Court in *In re Hickey,* 149 Tenn. 344, 386, 258 S.W. 417, 429 (1923), "the members of the bar have the best opportunity to become conversant with the character and efficiency of our judges. No class is less likely to abuse the privilege, as no other class has as great an interest in the preservation of an able and upright bench. **The rule contended for by the prosecution, if adopted in its entirety, would close the mouths of all those best able to give advice, who might deem it their duty to speak disparagingly."**

Ramsey, 771 S.W.2d at 121(emphasis added).

In *Justices of the Appellate Division v. Erdmann*, 22 N.Y.2d 559, 301 N.E.2d 426 (N.Y. 1973), disciplinary sanctions against a criminal defense lawyer who made numerous strongly critical comments concerning the judges before whom he practiced in New York City which were published in *Life* magazine were summarily reversed on appeal in a *per curiam* opinion where the court noted:

> Without more, isolated instances of disrespect for the law, Judges and courts expressed by vulgar and insulting words or other incivility, uttered, written, or committed outside the precincts of a court are not subject to professional discipline ....
>
> Perhaps persistent or general courses of conduct, even if parading as criticism, which are degrading to the law, the Bar, and the courts, and are irrelevant or grossly excessive would present a different issue. No such issue is presented now...
>
> Since appellant's out-of-court conduct was not censurable, it would not be appropriate to characterize further that conduct on the score of taste, civility, morality, or ethics.

Erdmann, 301 N.E.2d at 427 (citations omitted).

Based on the foregoing, I respectfully dissent in part.

Judge Robert H. ,Walker, dissenting in part:

Without reservation I agree that Mr. Lumumba's conduct before Judge Gordon and his remarks to the news media constitute violations of the Rules of Professional Responsibility. However, in light of Mr. Lumumba's prior Rules violations and discipline, I must respectfully dissent to the majority's finding that the evidence warrants nothing more than another Public Reprimand.

The evidence before this Tribunal establishes that Mr. Lumumba had been held in contempt four (4) times in three states before the events leading to the Formal Complaint in this case. He had received an admonishment in the State of

Michigan, an Informal Admonition by the Mississippi Bar's Committee on Professional Responsibility, and a Public Reprimand by The Mississippi Bar, the latter discipline having been imposed just a year before his reprehensible conduct in Leake County Circuit Court on October 17, 2001. Mr. Lumumba testified his two contempt citations in the State of Michigan had been overturned on appeal. Nonetheless, the Comment to Rule 8.4 states, "A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation." In light of Mr. Lumumba's prior offenses elsewhere, and especially in light of his contempt of court and Public Reprimand the year before the events here involved, the undersigned is of the opinion that Mr. Lumumba has demonstrated his indifference to his legal obligation to conduct himself in a professional manner. Mr. Lumumba's testimony about his contempt conviction before Judge Yerger in Hinds County, Mississippi in 2000, leaves little doubt that he deemed that contempt situation justifiable because he prevailed in the appeal of his client's conviction. Such an "ends justify the means" approach to professional responsibility invites chaos in our courts, engenders disrespect for our judicial system, and renders our Rules of Professional Conduct meaningless.

Lawyers are examples to their clients and the public, and must demonstrate respect for our judicial system and members of the judiciary in order to maintain public confidence in our judicial system. Even if Mr. Lumumba's courtroom conduct might be mitigated to some extent by the heat of the moment, his comments to news reporter Jimmie Gates cannot be so. His media attack on Judge Gordon was made almost two weeks after the courtroom scene – certainly sufficient time for anyone to maturely reflect on the nature and consequences of his behavior. What other intent can one ascribe to the remarks to the media other than to impugn the integrity and

qualifications of Judge Gordon, to disparage not only the judge but our judicial system itself?

The majority seems to feel Mr. Lumumba's contempt conviction and sentence should be considered in mitigation to sanctions imposed by The Bar – that because he has already been punished for his courtroom behavior, The Bar should be lenient in the discipline imposed for his violation of the Rules of Professional Conduct. I cannot agree. The contempt finding and sentence by the Circuit Court of Leake County, now affirmed by the Court of Appeals, demands that The Bar, in order to fulfill its duty to police its membership, impose such discipline as to leave no doubt that such behavior will not be tolerated amongst officers of the Court. Yet another Public Reprimand will not serve that purpose.

Mr. Lumumba has already proven that a Public Reprimand will not suffice to deter his unprofessional conduct. The behavior which resulted in his being Publicly Reprimanded just the year before the events involved in the present case included: referring to the Court's ruling as "Neanderthal;" showing disrespect for the Court by "throwing" a $100.00 bill on the bench and asking whether it would get "some justice" from the Court; and stating that participants to a lawsuit need "to pay to get some justice" from the Court. The opinion of the Bar's Committee on Professional Responsibility in that matter states:

> This complaint presents a situation that should never have taken place. Respect for the Court apparently left the Respondent at a time when the Court issued a ruling adverse to one of his clients. No matter how successful a lawyer has been throughout his career, it is not uncommon for a lawyer to receive an adverse ruling on a motion to which the lawyer may disagree,

> nor is it uncommon for a lawyer to disagree with rulings of a Court that are made concerning objections to evidence being offered or verdicts of a jury. Lawyers must anticipate these situations and react in a professional manner. As the U.S. Supreme Court has previously stated: "Lawyers are officers of the Court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be protected *(sic)* constitutionally protected speech." See *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991).
>
> * * *
>
> It is hoped that through the issuance of this Opinion and Judgment imposing a Public Reprimand, this incident will conclude an otherwise regrettable series of comments and actions and will restore respect for the Court and its officers.

The admonition obviously fell on deaf ears; the hope proved futile. Considering the abject failure of the first Public Reprimand to alter Mr. Lumumba's conduct, I cannot see how, in all good conscience, this Tribunal can expect a second Public Reprimand to do so.

The undersigned is of the opinion that Mr. Lumumba's repetition in the present case of conduct substantially similar to that for which he was so recently publicly reprimanded warrants his suspension from the practice of law for one year. The *ABA Standards for Imposing Lawyer Sanctions,* Section 8.2 states:

> Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that

> cause injury or potential injury to a client, the public, the legal system, or the profession.

The Commentary to Section 2.3, which defines the sanction of suspension, states that the amount of time for which a lawyer should be suspended should generally be a minimum of six months, as shorter suspensions may allow a suspended lawyer to:

> merely delay performing the requested services. If the lawyer eventually completes the work for the client and receives a fee, the suspension has only served to inconvenience the client.

The undersigned is of the opinion that Mr. Lumumba's conduct in this instance warrants, at a minimum, a one-year suspension from the practice of law, and a requirement that the Respondent successfully pass the ethics portion of the Mississippi Bar Examination prior to being reinstated to the practice of law. Therefore, I dissent from the decision to impose merely another Public Reprimand upon Mr. Lumumba.

(2)

No. 04-1696

OFFICE OF THE CLERK

In The
Supreme Court of the United States

CHOKWE LUMUMBA,

Petitioner,

v.

THE MISSISSIPPI BAR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Mississippi

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does it violate the First Amendment for a state court to discipline an attorney for falsely accusing an elected judge of dishonesty, ignorance, and lawlessness, where the attorney has previously made similar statements to intimidate judges in order to cause recusal, has twice been reprimanded for that tactic, and, in this case, acted against the interests of his client who later had to appear before the judge for resentencing?

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MISCELLANEOUS

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INTRODUCTION

None of the cases cited by the petitioner conflict with the decision here. He also fails to identify any wider conflict. He does not object to the legal standard the lower court applied. He does not challenge two of the disciplinary findings against him, and even admits that the third finding, for conduct prejudicial to the administration of justice, was supported by his in-court statements.

In the state court, petitioner's attack on the Miss. Rules Prof. Conduct 8.4(d) finding against him based on his "barbarian" statement depended on a factual finding the court refused to make. He contended he had not prejudiced the administration of justice because the proceedings had concluded before he made his statements. Appellee/Cross-Appellant's Brief at 15-17.

The state supreme court found, to the contrary, that the proceedings were not concluded. His client had an appeal to prosecute and, in fact, was successful in that appeal and obtained a remand to the same circuit court for resentencing. Pet. App. 17a-18a. An attorney's job is to represent a client, and it makes sense that the length of the proceeding should be judged from the client's point of view. No court has ever held to the contrary.

STATEMENT OF THE CASE

A. Facts.

The fact statement found in the Petition at 2-3 omits the chronology which is essential to an understanding of this case.

Mr. Lumumba is or has been admitted to practice in Michigan, New York and Mississippi. He has also been held in contempt in each of those states before this incident took place.[1]

In Mississippi, the Bar Committee on Professional Responsibility issued an informal admonition to Mr. Lumumba in 1997. Pet. App. 30a.

In 1996, Mr. Lumumba appeared before a circuit court judge in another district. He obtained a bench conference by falsely stating that he had a new issue to discuss. When the judge said he was not addressing a new issue, Mr. Lumumba called the judge "unfair and biased," and said, "you know, judge, you have a selective memory, but, since you don't seem to be listening anyway, I'm going to stop talking. It doesn't make sense to talk to nothing or nobody." The judge responded by saying "no other lawyer has ever talked to me the way you have talked to me today, Mr. Lumumba." The judge did not hold Mr. Lumumba in contempt but found Mr. Lumumba's conduct to be so inappropriate that he declared a mistrial and recused himself from the case. *Glover v. Jackson State University*, 755 So. 2d 395 (Miss. 2000). Pet. App. 31a. On appeal, the supreme court remanded to determine whether Mr. Lumumba or his client should pay the expenses caused by the mistrial. *Id.* at 404-405.

In 1999, Mr. Lumumba appeared before yet another circuit court judge. While the judge was ruling against his client, Mr. Lumumba attempted to leave the court room.

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[1] At the trial which led to this disciplinary action, Mr. Lumumba testified that the contempt findings against him in Michigan were reversed on appeal. Pet. App. 30a.

When the judge said he did not want Mr. Lumumba to walk out until he had finished, Mr. Lumumba responded:

> "Every time I come into this court you come up with some neanderthal kind of ruling. . . ."

He then told the judge that the judge did not know the law. He told the bailiff not to interfere with his legal assistant's exit from the court room. The court held him in contempt and this exchange followed:

By the Court:	You are going to be fined $100 for this contempt. And I suggest that you leave now.
By Mr. Lumumba:	Let me see my briefcase. Here's my briefcase. So you've got to try to pay to get some justice around here? Is that what it is, judge? Here. Here. Here's a $100 bill right here.
By the bailiff:	Sir, either have a seat or leave.
By Mr. Lumumba:	I have no concern about that. Here. Take the $100 and next time I come in here I'll get some justice.

[Public Reprimand] Opinion and Judgment dated April 13, 2000 in *Mississippi Bar v. Chokwe Lumumba*, Docket No. 99-208-1, Committee on Professional Responsibility for the Mississippi Bar, p. 1.

After making this comment, Mr. Lumumba approached the judge and threw a $100 bill on the bench.

The judge recused himself and referred the matter to the Bar. In its opinion, the Committee sanctioned Mr. Lumumba for violations of Miss. Rules Prof. Conduct 3.5(c), 8.4(a), (d), (e). The Committee stated that "it is hoped that . . . this incident will conclude an otherwise regrettable series of comments and actions and will restore respect for the court and its officers." *Id.* It limited his punishment to a public reprimand.

This case involves yet a third such incident. This one happened in 2001. Mr. Lumumba's similar comments to the circuit court judge in this case are found at Pet. App. 10a-15a. He again characterized a contempt citation as a demand that he pay a bribe, i.e., pay money for justice. He falsely stated that he had a "new issue" to raise when there was no such issue. He did this as a "subterfuge" to gain an opportunity to castigate the judge. Pet. App. 18a-19a. He interrupted the circuit judge no less than eight times during their exchange. He later tried to justify his in-court conduct as an attempt to make a record for his client, but he never identified what the alleged record would have contained. Pet. App. 9a-10a. When a newspaper reporter prepared an article on these three incidents, Mr. Lumumba did not use the word "neanderthal." Instead, this time he said the trial judge had "the temperament of a barbarian." Pet. App. 3a.

This time, the circuit judge did not recuse himself. The supreme court affirmed his client's conviction, but remanded one count to the circuit court for resentencing. *Payton v. State*, 897 So. 2d 921 (Miss. 2003). The judge who resentenced Mr. Lumumba's client was the same judge whom Mr. Lumumba had previously castigated. Pet. App. 17a-18a.

B. Procedural History.

The Petition does not fully describe actions of the state appellate courts in this matter.

Findings in contempt case.

In affirming the separate contempt citation against Mr. Lumumba arising out of the incident in question here, the state Court of Appeals said that it could find no legitimate basis for Mr. Lumumba's remarks. It said:

> We cannot fathom any situation that would warrant such behavior. This Court finds that the statements made toward the judge about how he can better get along with lawyers in the future, about the judge's 'henchman,' and about being proud to be thrown out of the courtroom, and about paying the judge for justice were made to embarrass the court or impede the administration of justice. This Court finds that the statements go far beyond zealous representation.

Lumumba v. State, 868 So. 2d 1018, 1021 (Miss. Ct. App. 2003).

Other disciplinary findings by Supreme Court.

In the disciplinary opinion as to which review is now sought, the state Supreme Court made two findings the Petition fails to mention.

First, the court found that Mr. Lumumba had violated Miss. Rules Prof. Conduct 3.5(c) which states that "[a] lawyer shall not: . . . engage in conduct intended to disrupt the tribunal." In so holding, it relied on the comment to Rule 3.5 which states:

> Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants.

Pet. App. 5a-6a. *Mississippi Bar v. Lumumba*, 2005 WL 613579 (Miss. Mar. 17, 2005). The Court found Mr. Lumumba's contention that he was trying to make a record for his client specious. It also found that Mr. Lumumba was attempting to bully the trial judge but, this time, failed. It said he:

> was purposely attempting to exert influence over Judge Gordon through intimidation. Lumumba's menacing, belligerent attitude was an unmistakable attempt to 'bully' Judge Gordon into making decisions that were in accordance with Lumumba's ultimate intentions.

Pet. App. 16a. The Petition does not dispute these findings.

Second, the Petition does not mention that the court also found that Mr. Lumumba violated Miss. Rules Prof. Conduct 8.2(a) by making statements concerning the "qualifications or integrity" of a judge which he knew to be false or with reckless disregard as to their truth or falsity. The court found as a matter of fact that it was readily apparent that "all of Lumumba's statements were, in fact, made with willful, reckless disregard as to their truth concerning Judge Gordon's qualifications and integrity as a judge." Pet. App. 22a. It said:

> The repeated similar allegations of buying justice in several different courts suggests that Lumumba keeps a $100 bill specifically for the purpose of theatrically demonstrating "paying for justice" when the opportunity presents itself.

Pet. App. 23a. After noting that the term "barbarian" meant a lack of learning or a tendency toward violence or lawlessness, the Court found that Mr. Lumumba "willfully and knowingly undermined the presumed integrity and qualifications of Judge Gordon." To suggest otherwise, it said it would be "condonation that incites continued patterns of egregious disrespect by some lawyers for the judiciary." Pet. App. 24a. The Petition also does not challenge these findings, and, in fact, acts as if there were no Rule 8(a)(2) issue before the state supreme court. *See* Pet. 5 (describing supreme court opinion without mentioning the Rule 8.2(a) issue).

Sole ground for review.

In other words, the sole ground for review presented by the Petition is the supreme court's separate finding under Rule 8.4(d) that Mr. Lumumba's statement to the newspaper was also "conduct that is prejudicial to the administration of justice . . . " In reaching that decision, it took as its touchstone this Court's statement that conduct prejudicial to the administration of justice is conduct that "shows an unfitness to discharge continuing obligations to clients or the courts." *In re Snyder*, 472 U.S. 634, 645 (1985). The state supreme court also relied on the comment to Rule 8.4 which states that "a lack of those characteristics relevant to law practice" prejudices the administration of justice. Pet. App. 17a-18a. *See also* Rule 8.4 comment ("A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.").

Importantly, the state Supreme Court found that the proceeding was ongoing when Mr. Lumumba made his

statements, because his client's sentence was to be appealed and, in fact, had both been appealed and then remanded to the same judge. Pet. App. 18a-19a. The "barbarian" comment, it said, "definitely indicates a lack of those characteristics relevant to the practice of law and was directly related and connected to the judicial proceeding." Pet. App. 19a. It showed that he was unfit "to discharge continuing obligations to clients or the courts which the [United States] Supreme Court holds as synonymous to conduct that is prejudicial to the administration of justice." *Id.* As to the First Amendment issue, it said the issue was not whether the judge's reputation had been harmed, but whether the criticism "adversely affects the administration of justice and adversely reflects on the attorney's judgment, and, consequently, [his] ability to practice law." Pet. App. 21a-22a, quoting *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1990). Mr. Lumumba's misconduct, it said, satisfied this standard.

The court also said:

> Lumumba's duty was to his client, not to his own need to test the trial judge in a verbal battle over whether or not the trial court had been fair, and whether the trial court needed instruction in how best to get along with lawyers among other inappropriate comments. Under the guise of "protecting the record," Lumumba abandoned his client to pursue his own interest.

Pet. App. 26a. It then concluded:

> The public is entitled to know that when lawyers engage in such conduct, their clients are not well served.

Pet. App. 27a. Finally, it concluded that it knew "of no other case decided by this court where an attorney has addressed a trial court in the manner as disrespectful and insulting as here." Pet. App. 28a.

The two dissenting justices would have held that the proceeding was not ongoing when Mr. Lumumba made his remarks. Pet. App. 35a, 43a (disagreement is with majority's "determination of facts"). But it was nevertheless conceded that Mr. Lumumba's remarks were "irresponsible and unbefitting a member of the Bar," Pet. App. 34a, and that his comments were "wrong and completely inappropriate," Pet. App. 39a, and his conduct "on the record fell short of these [Rule 3.5] honorable standards", Pet. App. 42a.

REASONS WHY THE WRIT SHOULD BE DENIED

A. There is no conflict among the courts concerning the legal standard to be applied in Rule 8.4(d) cases.

The Petition fails to identify a conflict worthy of certiorari review. It simply claims that this lone state supreme court decision is wrong because it applied the accepted law in a manner that allegedly conflicts with decisions of a few other courts. It does not identify any point at which the decision misstated the law. As Sup. Ct. R. 10 cautions: a writ is rarely granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Nor does it identify any widespread disagreement about what the law is.

Moreover, there is no conflict. If anything, the cited decisions support the state court decision.

Cases on which petitioner relied.

In the state Supreme Court, the petitioner relied on two of the five cases now said to be in conflict with that court's decision. *See* Appellee-Cross-Appellants Brief at 15-17; Appellee/Cross-Appellants Reply Brief at 3-5. They are as follows:

Ramsey v. Board of Professional Responsibility, 771 S.W.2d 116 (Tenn. 1989). The Tennessee Supreme Court affirmed disciplinary sanctions against an elected district attorney for contemptuous conduct, but refused to sanction him for remarks he had made not related to an on-going case, i.e., that a judge was "mucking up" his cases. After discussing the attorney's right of free speech, it said a lawyer had a right to criticize a judge:

> after a case is concluded so long as the criticisms are made in good faith with no intent or design to willfully or maliciously misrepresent those persons and institutions or to bring them into disrepute.

Id. at 121. Because the remarks were made after the cases in question were concluded and it found no willful intent to bring the judge into disrepute, the court refused to sanction the attorney.

Here, the remarks were made in the midst of an on-going case, and were about that case. In separate decisions, the state appellate courts have found that his statements were unwarranted, were intended to bully the judge, and were intended to interfere with the administration of justice.

Standing Committee v. Yagman, 55 F.3d 1430 (9th Cir. 1995). The Ninth Circuit set aside federal court discipline of an attorney who had accused a judge of anti-Semitism. It commented, however, that an accusation of dishonesty would be sanctionable, *id.* at 441, and that the standard for assessing a lawyer's conduct was an objective standard pursuant to which the court must determine what "a reasonable attorney, considered in the light of all of his professional functions, would do in the same or similar circumstances." *Id.* at 437, quoting, *United States District Court v. Sandlin*, 12 F.3d 961 (9th Cir. 1993).

It found that the attorney, even if he was attempting to force the judge to recuse himself, had not engaged in conduct prejudicial to the administration of justice both because a party cannot legally force a judge to recuse himself and because the judge in question was a federal judge with life tenure. *Id.* at 1443-4.

In this case Mr. Lumumba accused the elected state circuit judge of dishonesty and lawlessness. The state Supreme Court applied the *Sandlin* objective standard and found his actions objectively unreasonable. Pet. App. 22a. Also, in this case, the danger to the administration of justice presented by his intimidation tactics is readily apparent. Mr. Lumumba had previously used similar tactics to obtain the unwarranted recusal of two other circuit court judges.

Other cases cited here.

Nor do the other cases the Petition says conflict with this one help the petitioner:

Idaho State Bar v. Topp, 925 P.2d 1113 (Idaho 1996). The Idaho Supreme Court upheld a public reprimand of an attorney who publicly accused a judge of making a decision for political reasons. The court noted that the statement by the attorney insinuated the attorney was privy to some facts unavailable to the public. *Id.* at 1115. It, too, relied on the *Sandlin* objective standard. *Id.* at 1116. Because the attorney had no proof that the judge's decision was politically motivated, the Court concluded that "a reasonable attorney, in considering these facts, would not have made the statement in question." The statement impuned the judge's integrity, and so established a violation.

Topp supports the state Supreme Court's action in this case. Mr. Lumumba has made no attempt to prove that the judge in fact lacked legal learning, or was violent, or refused to follow the law, which are the definitions of barbaric conduct.

State ex rel. Oklahoma Bar Association v. Porter, 766 P. 2d 958 (Okla. 1988). The court said an attorney could not be disciplined for saying a judge was racist when the attorney explained why he believed that was true. It also said, however, that it would be impermissible for an attorney to say that a judge was a crook or was in a conspiracy to rob him. *Id.* at 962.

The court also squarely rejected the notion that out-of-court statements were different from in-court statements. It quoted *In re Sawyer*, 360 U.S. 622, 635 (1959) as saying "the verbalization is that it is impermissible to litigate by day and castigate by night." *Id.* at 965. *See also Sawyer*, 360 U.S. at 636 (lawyer statements "are equally serious whether he is currently engaged in litigation before the judge or not.").

In this case, Mr. Lumumba had no basis whatsoever for his claim that he had bought justice in other courts or that the circuit judge was a lawless barbarian.

In re Erdmann, 33 N.Y. 2d 559, 301 N.E. 2d 426 (N.Y. 1973). The New York Court of Appeals set aside discipline against a lawyer who, with reference to the legal system as a whole commented to a publication that appellate judges were "whores who became madams." Avoiding the constitutional issue, the Court said that comments made "outside the precincts of the court are not subject to professional discipline" under state law. *Id.* at 427.

In this case, Mr. Lumumba's comments were about a specific judge and a specific proceeding. Also, New York law now allows a lawyer to be disciplined for remarks made outside the courtroom. *In re Holtzman*, 78 N.Y. 2d 184, 577 N.E. 2d 30 (N.Y. 1991) (discipline for public letter "prejudicial to the administration of justice" which "adversely reflects on [the attorney's] fitness to practice law. . . .").

None of these decisions stands in the way of disciplining an attorney who, during a pending case, accuses a judge of being a "barbarian," i.e., a stupid, violent person who does not follow the law, especially when the attorney fails to even argue that any of those things are true.

Points B and C.

In particular, with respect to Petition "Law and Argument" points B and C:

* Point B appears to argue that a different standard is applied to remarks made outside the courtroom after a case is over. *See, e.g., Yagman, supra*, 55 F.3d at 1438

(must show clear and convincing evidence of prejudice when remark is made after the case is over). But the state Supreme Court here found the case was not over, particularly where Mr. Lumumba's client, in fact, had to appear before the same judge for resentencing. That makes perfect sense from the client's point of view.

* Point C alleges that Mr. Lumumba could not be disciplined because his characterization of the judge as a "barbarian" could not be proven true or false, and was mere opinion.

The lower court did not reach this point, because the interest it sought to protect was not the reputation of the judge, but the interest of the client who had to appear before that judge. That is why the courts have adopted the *Sandlin* "reasonable attorney" standard for determining whether attorney speech in a pending case prejudices the administration of justice. It is analogous to Fed. R. Civ. P. 11 which penalizes frivolous arguments. An attorney's job is to represent his client, not himself.

In addition, calling a judge a "barbarian" is bad advocacy. In fact, it is advocacy in reverse. Persuasion, as Aristotle said, depends not only on logic but on the reputation and bearing of the speaker and the emotions of the audience. Such a comment would make even the sternest judge think less of the attorney who made such a remark, and could provoke the judge to reject the attorney's arguments, if the law allowed room for that, as it frequently does. *See* B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1937).

Moreover, whatever a "barbarian" is, a "barbarian" is not a qualified judge who acts with integrity, as all judges swear to do. Such an accusation is a demonstrably false statement of fact when made with respect to a decision of

a court in which the judge displayed learning, a proper judicial demeanor, and adherence to the law.

B. In addition, there are prudential reasons not to grant the writ.

Same result.

Petitioner has not challenged two of the three grounds on which he was disciplined. Also, with respect to his interference with the administration of justice, i.e., violation of Rule 8.4(d), he does not dispute that his courtroom conduct was a violation. All he challenges is the part of the finding that concerned his "barbarian" statement. As a result, it is unlikely that, even if he succeeded here, the result would be any different on remand, although that is possible.

Contrary finding unchallenged.

In addition, one of the grounds he does not challenge directly contradicts his claim that his statement was opinion, not fact. The Rule 8.2(a) holding rested on a finding that he had made a knowingly false statement about the qualifications or integrity of a judge. Pet. App. 23a. That finding under Rule 8.2(a) is now final, and not subject to review. It is also correct, in part because the comment was intended to summarize the false allegations previously made in court.

Misstatement of constitutional rule.

Furthermore, this Court has held that the common law protection of opinion is not required by the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1,

18-19 (1990). Mr. Lumumba's statement was in no way "political hyperbole." It was not made in an election context.

Prior adjudication.

In this matter, Mr. Lumumba was found by the state appellate court in the 2003 contempt decision to have acted in a contemptuous manner "designed to impede the administration of justice." *See* p. 5, *supra*. That ruling is final and was not brought to this court. It would be odd for this Court to grant certiorari and, in effect, collaterally attack that prior ruling.

Even if there were a conflict on an important legal question, which there is not, this would not be an appropriate case to choose to decide that question.

CONCLUSION

The power of a court depends on the integrity of its judges. The ability of a court to make peace in society depends not only on the respect the court shows for the litigants, but also on the respect the litigants have for the court. When a lawyer, whom the public presumes has special knowledge, makes public statements that a court is demanding money before it will give justice, and that a judge is ignorant, lawless, and violent, the public is prone to believe that the statements have a factual basis. That diminishes respect for the court system, disserves the client, and interferes with the administration of justice. The state Supreme Court properly sanctioned Mr. Lumumba.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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